(1973) 4 Supreme Court Cases 225

(Original Jurisdiction)

[BEFORE S. M. SIKRI, C. J., AND J. M. SHELAT, K. S. HEGDE, A. N. GROVER, A. N. RAY, P. JAGANMOHAN REDDY, D. G. PALEKAR, H. R. KHANNA, K. K. MATHEW, M. H. BEG, S. N. DWIVEDI, A. K. MUKHERJEA AND Y. V. CHANDRACHUD, JJ.]

Writ Petition No. 135 of 1970

HIS HOLINESS KESAVANANDA BHARATI SRIPADAGALVARU ... Petitioner ;

Versus

STATE OF KERALA AND ANOTHER ... Respondents.

Writ Petitions Nos. 351 and 352 of 1972

SHRI RAGHUNATH RAO GANPAT RAO N. H. NAWAB MOHAMMED IFTIKHAR ALI KHAN ... Petitioner ;

Versus

UNION OF INDIA ... Respondent.

Writ Petitions Nos. 373 and 374 of 1972

SHETHIA MINING AND MANUFACTURING CORPORATION LTD. ETC. ... Petitioners ;

Versus

UNION OF INDIA AND OTHERS ... Respondents.

Writ Petition No. 400 of 1972

THE ORIENTAL COAL CO. LTD. ... Petitioner ;

Versus

UNION OF INDIA AND ANOTHER ... Respondents.

Writ Petitions Nos. 135 of 1970 and 351, 352, 373, 374 and 400 of 1972, decided on April 24, 1973

Editor's note: Scheme of the headnote.—Though the main question has been the nature, extent and scope of the amending power, it has been discussed in the background of the scheme of the Constitution by application of principles of Constitutional interpretation.

The headnote has been divided into eight parts. Part I deals with the views expressed on the Constitution of India while Part II on the Preamble. In Part III is detailed the various principles of Constitutional interpretation applied. Part IV then deals with the main question of scope and extent of amending power including the question of amendability of Part III and also the question of implied and inherent limitation on the amending power.* Parts V, VI and VII deal with the validity of the 24th, 25th and 29th Amendments. Part VII contains miscellaneous questions discussed by the Court.

Most of the cases cited in the judgments have been annotated at the relevant places in the headnote and the complete list would be found under the Table of Cases Cited. A complete list of treatises and books cited is also given, separately.

* (*See* particularly the approach of Hegde & Mukherjea, JJ. on these two questions.)

What has been held by the majority? Such a question is usually answered with ease by what is stated in the Order of the Court. But in this case even though the Order of the Court lists the holdings, the matter is complicated by the fact that only nine out of the thirteen Judges constituting the Bench signed the Order. The Order is given on p. 1006 (Para 2145). The holding of the majority is clear on the aspect that under Article 368 Parliament cannot alter the basic structure or framework of the Constitution but the same cannot be stated with confidence regarding the Fundamental Rights—the whole chapter or only some of fundamental rights or core or essence of some or all of them—being outside the scope amending power. The validity of the 24th Amendment Act is beyond doubt and so also of Section 2(*a*) and (*b*) of 25th Amendment Act though the meaning and scope of new Article 31(2) and the scope of judicial review with regard to it is not beyond controversy. The second part of Section 3 of 25th Amendment has been struck down which means that the declaration in any law will not be conclusive of the fact of its giving effect to the policy under Article 39(*b*) and (*c*) but open to judicial review. The 29th Amendment has been upheld.

The page and para correspondence of each judgment is given herewith :

		Paras	*Pages*	*No. of Pages*
1.	Sikri, C. J.	1-477	305-405	101
2.	Shelat & Grover, JJ.	478-609	406-463	58
3.	Hegde & Mukherjea, JJ	610-745	463-512	49
4.	Ray, J.	746-1067	513-594	82
5.	Jaganmohan Reddy, J.	1068-1213	594-667	73
6.	Palekar, J.	1214-1334	668-726	58
7.	Khanna, J.	1335-1538	726-825	99
8.	Mathew, J.	1539-1790	825-898	73
9.	Beg, J.	1791-1858	898-919	21
10.	Dwivedi, J.	1859-1996	919-959	40
11.	Chandrachud, J.	1997-2144	959-1006	47
				701

PART I—CONSTITUTION OF INDIA

Nature and special features of the Indian Constitution—Philosophy and purpose underlying the Constitution—Features relevant to the consideration of the scope and ambit of the amending power of Parliament.

Per Sikri, C.J.

While interpreting the Constitution one must not construe it as an ordinary statute. The Constitution apart from setting up a machinery for government, has a noble and grand vision in the Preamble.
(Para 15)

Per Shelat & Grover, JJ.

Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of depriva-

SCC Online Web Edition Academic

Part I—Constitution of India (*contd.*)

tion of basic freedoms and from the point of view of exploitation of the millions of Indians The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation. (Para 482)

The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four corners of the Constitutional provisions. All the functionaries, be they legislators, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights. (Para 486)

It is a written and controlled Constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. (Para 486)

The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections. (Para 486)

Per Hegde & Mukherjea, JJ.

Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. (Para 651)

Per Palekar, J.

The Constitution is not an indigenous product. (Para 1219)

The Constitution is a legal document and if it says that the whole of it is amendable, we cannot place the fundamental rights out of bounds of the amending power. (Para 1278)

Per Khanna, J.

A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is constitution like a plaint or a written statement filed in a suit between two litigants. A constitution must of necessity be the vehicle of the life of a nation. (Para 1437)

It provides for the framework of the different organs of the State, *viz.*, the executive, the legislature and the judiciary. A constitution also reflects the hopes and aspirations of a people. (Para 1437)

Per Mathew, J.

The Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. A constitution is not an end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. (Para 1563)

Per Beg, J.

The good of the mass of citizens of our country is the supreme law embodied in our Constitution prefaced as it is by the preamble or the 'key' which puts "justice, social, economic and political" as the first of the four objectives of the Constitution by means of which "the people of India" constituted "a Sovereign Democratic Republic." (Para 1797)

PART II—PREAMBLE TO THE CONSTITUTION OF INDIA

Nature and purpose of the declaration in the Preamble—Importance of Preamble in a Constitution—Whether indicates the basic and essential features of the Constitution—Whether statements of the Preamble justiciable—Whether Preamble vague—Whether Fundamental Rights an elaboration of the Preamble—Whether Preamble indicates the supremacy of Fundamental Rights over the Directive Principles.

Preamble if part of the Constitution—Whether a material question—Whether Preamble a source of power—Whether a source of *prohibitions and limitations*.

Preamble if can be amended—Whether Preamble can be repealed.

Preamble declaring India a "Sovereign Democratic Republic"—Meaning of "Sovereign"—Whether People of India sovereign—Whether Constitution of India sovereign—Legal and political sovereignty.

Preamble as an aid in Constitutional interpretation (see infra).

Whether a source of implied limitations on amending power (see infra).

Per Sikri, C.J.

The Constitution has a noble and grand vision contained in the Preamble. (Para 15)

So far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has to be attached to the Preamble in a Constitutional statute. (Para 91)

Tribhuban Parkash Nayyar v. *Union of India*, (1970) 2 SCR 732-737 : (1969) 3 SCC 99, *distinguished*.

The holding in *In re Berubari Union* followed by Wanchoo, J. and Bachawat, J. in *Golak Nath case* that Preamble is not part of the Constitution, is wrong. It was expressly voted to be part of the Constitution. The holding that the Preamble is not a source of power cannot be extended as regards prohibitions and limitations. In fact limitations have been derived in certain cases. (Paras 94-98)

In re Berubari Union and Exchange of Enclaves, (1960) 3 SCR 250; 281-82: AIR 1960 SC 845: 1960 SCJ 933 and *Golaknath* v. *State of Punjab*, (1967) 2 SCR 762; 838; 914: AIR 1967 SC 1643 : (1967) 2 SCJ 486, *overruled*.

Part II—Preamble *(contd.)*

Behram Khurshed Pesikaka v. *State of Bombay,* (1955) 1 SCR 613; 653: AIR 1955 SC 123: 1955 SCJ 73; *In re The Kerala Education Bill,* 1957, 1959 SCR 995, 1018-1019: AIR 1958 SC 956: 1959 SCJ 321; *Sajjan Singh* v. *State of Rajasthan,* (1965) 1 SCR 933, 968: AIR 1965 SC 845: (1965) 1 SCJ 377, *relied on.*

The Preamble of the Constitution of India does not seem to prescribe any vague doctrines like the law of natural justice even if the latter, contrary to many decisions of our Court, be considered vague. (Para 252)

Per Shelat & Grover, JJ.

The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence i.e., a Sovereign Democratic Republic. (Para 486)

The Preamble and indeed the whole Constitution was drafted in the light of and directions contained in the "objectives resolution" adopted on January 22, 1947. (Para 488)

The Constitution-makers gave to the preamble the pride of place. It embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well-defined words the key to the understanding of the Constitution. (Para 506A)

The history of the drafting and the ultimate adoption of the Preamble shows—

(1) that it did not "walk before the Constitution" as is said about the Preamble to the United States Constitution;

(2) that it was adopted last as a part of the Constitution;

(3) that the principles embodied in it were taken mainly from the Objectives Resolution;

(4) the Drafting Committee felt, it should incorporate in it "the essential features of the new State";

(5) that it embodied the fundamental concept of sovereignty being in the people. (Para 513)

The Preamble embodies the fundamentals underlying the structure of the Constitution. (Para 515)

Behram Khurshed Pesikaka's case, (1955) 1 SCR 613 at p. 653: AIR 1955 SC 123; *Basheshar Nath* v. *C.I.T. Rajasthan,* 1959 Supp 1 SCR 528: AIR 1959 SC 149; *In re Kerala Education Bill, 1957,* 1959 SCR 995: AIR 1958 SC 956; *Rex.* v. *Hess,* (1949) Bom LR 199 at p. 208; *John Switzman* v. *Freda Elbling & A.G. of the Province of Quebec,* (1957) Canada L.R. 285 at p. 376 (Supreme Court) and *McCawley* v. *The King,* (1970) AC 691 at p. 711, *relied on.*

In Re. Alberta Statutes, (1938) SCR 100 (Canada) and *A.G. for Alberta* v. *A.G. for Canada* (1939) AC 117, *referred.*

The Preamble was adopted by the Constituent Assembly after the entire Constitution had been adopted. (Para 518)

It hardly makes any substantial difference whether the Preamble is a part of the Constitution or not. (Para 520)

SCC Online Academic Edition

Part II—Preamble (*contd.*)

The Preamble serves several important purposes. Firstly, it indicates the source from which the Constitution comes viz. the people of India. Next it contains the enacting clause which brings into force the Constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of Government and polity which was to be established. (Para 520)

The Preamble is unamendable. It cannot be varied, altered or repealed. (Para 521)

The true function of the Preamble is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantially to create them. (Para 522)

The Sovereign Democratic Republic has been constituted to secure to all the citizens the objectives set out. The attainment of those objectives forms the fabric of and permeates the whole scheme of the Constitution. (Para 533)

Since the language of the Preamble was taken from the resolution itself the declaration in the Preamble that India would be a Sovereign Democratic Republic which would secure to all its citizens justice, liberty and equality was implemented in Parts III and IV and other provisions of the Constitution. These formed not only the essential features of the Constitution but also the fundamental conditions upon and the basis on which the various groups and interests adopted the Constitution as the Preamble hoped to create one unified integrated community. (Para 535A)

Bribery Commissioner v. *Pedrick Ranasinghe*, (1965) AC 172 at pp. 193-194 and *In re The Regulation and Control of Aeronautics in Canada*, (1932) AC 54 at p. 70, *relied on.*

Per Hegde & Mukherjea, JJ.

From the Preamble it is quite clear that the two primary objectives that were before the Constituent Assembly were (1) to constitute India into a Sovereign Democractic Republic and (2) to secure to its citizens the rights mentioned therein. It was a plan to build a welfare State and an egalitarian society. (Para 648)

The statement in the Preamble that the people of this country conferred the Constitution on themselves is not open to challenge before this Court. Its factual correctness cannot be gone into by this Court which again is a creature of the Constitution. The facts set out in the Preamble have to be accepted by this Court as correct. (Para 652)

Per Ray, J.

The Preamble has never been regarded as the source of any substantive power, because such powers are expressly granted in the body of the Constitution. The Supreme Court in *Berubari case* said "what is true about the powers is equally true about prohibitions and limitations." (Para 884)

In re Berubari Union, (1960) 3 SCR 250 : AIR 1960 SC 845, *relied on.*

The petitioner's contention that the Preamble is not a part of the Constitution is nullified by the petitioner's reference to and reliance on the Preamble as the source of all inherent limitations. (Para 885)

The Preamble is an integral part of the statute and it can be repealed. (Para 886)

A.K. Gopalan v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27, *relied on.*

The Preamble in a Constitution refers to the frame of the Constitution at the time of the Preamble, and, therefore, it can possibily have no relevance to the constituent power in the future, when that Constitution itself can be changed. (Para 892)

The Preamble did not come into force on November 26, 1949. (Para 895)

Per Jaganmohan Reddy, J.

There is nothing vague or unascertainable in the Preamble and if what is stated therein

Part II—Preamble (*contd.*)

is subject to this criticism it would be equally true of what is stated in Article 39(*b*) and (*c*) as these are also objectives fundamental in the governance of the country which the State is enjoined to achieve for the amelioration and happiness of its people. (Para 1159)

Per Palekar, J.

The Preamble, being a part of the Constitution, strictly speaking, is amendable under Article 368.

The submission that the fundamental rights are an elaboration of the Preamble is an over-statement and a half truth. (Para 1301)

The Preamble read as a whole does not contain the implication that in any genuine implementation of the Directive Principles, a fundamental right will not suffer any diminution. (Para 1305)

Per Khanna, J.

Preamble is a part of the Constitution. (Para 1471)

Preamble relates to the basic structure or framework of the Constitution.

Per Mathew, J.

The Preamble to the Constitution of India says that "we the people of India. ...... adopt, enact and give unto ourselves this Constitution". Every one knows that historically this is not a fact. The assertion by some of the makers of the Constitution that the Constitution proceeded from the people can only be taken as a rhetorical flourish, probably to lay its foundation on the more solid basis of popular will and to give it an unquestioned supremacy. (Para 1603)

There seems to be no valid reason why the preamble, being a part of the Constitution, cannot be amended. (Para 1618)

A preamble represents, at the most only an intention which an Act seeks to effect and it is a recital of a present intention. (Para 1619)

The broad concepts of justice, social, economic and political, equality and liberty thrown large upon the canvas of the preamble as eternal verities are mere moral adjurations with only that content which each generation must pour into them anew in the light of its own experience. (Para 1621)

As regards the people of India being sovereign it is difficult to understand how the unorganised mass of the people can *legally* be sovereign. In no country, except perhaps in a direct democracy, can the people *enmasse* be called legally sovereign. Political power must be in a determinate person or body of persons, for, the people at large, the whole people, as distinct from particular person or persons, are incapable of concerted action and hence, of exercising political power and therefore of legal supremacy. The supremacy enjoyed by the Constitution has led some to think that the document must be regarded as sovereign. They talk about the government of laws and not of men; but sovereignty, by definition, must be vested in a person or body of persons. The Constitution itself is incapable of action. (Paras 1606 & 1607)

Per Beg, J.

There is not to be found, anywhere in our Constitution, any transfer of legal sovereignty to the people of India. Now the Constitution is the "legal sovereign" recognised by Courts, although the ultimate 'political' sovereignty may and does reside in "the people". Sovereignty is not vested in all its aspects in any one of the three organs of the State but may be divided between them. A mark of such sovereignty is certainly the possession of "Constituent Power" although the totality of sovereign power may be divided. (Paras 1810 to 1814)

Part II—Preamble (*contd.*)

Per Dwivedi, J.

Preamble is a part of the Constitution and it is liable to amendment under Article 368. (Paras 1882 & 1883)

Per Chandrachud, J.

It is impossible to accept the contention that the Preamble is not a provision of the Constitution. The record of the Constituent Assembly leaves no scope for this contention. (Para 2086)

PART III—DIRECTIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

Directive Principles of State Policy—Nature and object of—If an essential feature of the Constitution—Concept of social justice in Directive Principles—Binding nature of—Non-enforceability through courts of law—Inference—Article 37—Whether courts as part of "State" bound to apply Directive Principles in judicial work—Article 39—Nature and Scope—Directive Principles and the Preamble—Concept of social justice in Directive Principles.

Fundamental Rights—Nature—If essential feature of the Constitution—Inalienability—Human Rights—Core of Fundamental Rights—Abrogation—(See infra.)

Directive Principles, Fundamental Rights and the Preamble—Nature of Directive Principles and Fundamental Rights and relationship with the Preamble—Balancing of Fundamental Rights and Directive Principles—Conceptual relationship between the two in the background of the Preamble—Whether Fundamental Rights the means and Directive Principles the end—Fundamental Rights whether in a position of precedence or subservience to Directive Principles or whether complimentary—Relationship if constant for all times—Who to decide their relative importance—Application of Rule of Harmonious Construction.

Per Sikri, C. J.

It is impossible to equate the Directive Principles with Fundamental Rights though it cannot be denied that they are very important. But to say that the Directive Principles give a directive to take away Fundamental Rights in order to achieve what is directed by the Directive Principles seems to be a contradiction in terms. (Para 147)

Per Shelat & Grover, JJ.

Parts III and IV which embody the Fundamental Rights and Directive Principles of State Policy have been described as the conscience of the Constitution. The Directive Principles of State policy set forth the humanitarian socialist precepts that were the aims of the Indian social revolution. The Fundamental Rights and the Directive Principles were designed by the members of the Assembly to be the chief instruments in bringing about the great reforms of the social revolution. They have helped to bring the Indian society closer to the Constitution's goal of social, economic and political justice for all. (Paras 486 and 489)

In *re Kerala Education Bill*, 1957, 1959 SCR 995 at p. 1020: AIR 1958 SC 956; *State of Madras* v. *Smt. Champakam Dorairajan*, 1951 SCR 525 at p. 531: AIR 1951 SC 226 and *Mohd. Hanif Qureshi* v. *State of Bihar*, 1959 SCR 629: AIR 1958 SC 731, *referred.*

Part III—Directive Principles and Fundamental Rights *(contd.)*

While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised—then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted. (Para 533)

Parts III and IV essentially form a basic element of the Constitution without which its identity will completely change. A number of provisions in Parts III and IV are fashioned on the U. N. Declaration of Human Rights (Paras 533 and 535)

Article 39(*b*) and (*c*) together with the other provisions of the Constitution contain one of the main objectives, namely, the building of a welfare State and an egalitarian social order in our country. While the Constitution-makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual. Part III of the Constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual. Our Constitution-makers did not contemplate any disharmony between the Fundamental Rights and the Directive Principles. They were meant to supplement one another. It can well be said that the Directive Principles prescribed the goal to be attained and the Fundamental Rights laid down the means by which that goal was to be achieved. (Para 596)

In re Kerala Education Bill, 1957, 1959 SCR 995 : 1958 SC 956, *relied on.*

Per Hegde & Mukherjea, JJ.

The Directive Principles embodied in Part IV of the Constitution or at any rate most of them are as important as the rights of individuals. The Directive Principles and the Fundamental Rights mainly proceed on the basis of Human Rights. Freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution. (Paras 634 and 646)

The Fundamental Rights and the Directive Principles constitute the 'conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. Equally, the danger to democracy by an over-emphasis on duty cannot be minimised. Indeed the balancing process between the individual rights and the social needs is a delicate one. This is primarily the responsibility of the "State" and in the ultimate analysis of the courts as interpreters of the Constitution and the law. (Paras 712 to 715)

Per Ray, J.

The Directive Principles are also fundamental. They can be effective if they are to prevail over Fundamental Rights of a few in order to subserve the common good and not to allow economic system to result to the commnn detriment. (Para 1015)

The successive amendments of the Constitution merely carried out the principle embodied in Article 31, clauses (4) and (6) that legislation designed to secure the public good and to implement the Directives under Article 39(*b*) and (*c*) should have priority over individual rights and that therefore Fundamental Rights were to be subordinate to Directive Principles of State Policy. (Para 1043)

Part III —Directive Principles and Fundamental Rights *(contd.)*

Directive Principles are not limited to agrarian reforms. Directive Principles are necessary for the uplift and growth of industry in the country. (Para 1036)

Parts III and IV of the Constitution touch each other and modify. They are not parallel to each other. (Para 1044)

The concept of property right in Part IV is conditioned by social interest and social justice. (Para 1045)

The social interest and justice may vary from time to time and territory to territory and individual rights may have to be limited. (Para 1045)

Article 14 has the flexibility of classification. Article 19 has the flexibility of reasonable restrictions. Social justice will determine the nature of the individual right and also the restriction on such right. Social justice will require modification or restriction of rights under Part III. The scheme of the Constitution generally discloses that the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary individual rights have been subordinated or cut down to give effect to the principles of social justice. Social justice means various concepts which are evolved in the Directive Principles of the State. (Para 1051)

Popular sovereignty means that the interest which prevails must be the interest of the mass of men. If rights are built upon property those who have no property will have no rights. That is why the State has to balance interest of the individual with the interest of the society. Industrial democracy is the necessary complement to political democracy. The State has to serve its members by organising an avenue of consumption. This can be done by socialisation of those elements in the common welfare which are integral to the well being of the community. (Para 1016)

Per Jaganmohan Reddy, J.

There can be no doubt that the object of the Fundamental Rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State Policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. (Para 1161)

What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37, are fundamental in the governance of the country. (Para 1161)

Per Palekar, J.

A law made for implementing the Directive Principles of Article 39(*b*) and (*c*), instead of being contrary to the Preamble, would be in conformity with it because while it may cut down individual liberty of a few, it widens its horizon for the many. (Para 1304)

The Preamble read as a whole does not contain the implication that in any genuine implementation of the Directive Principles, a Fundamental Right will not suffer any dimunition. (Para 1305)

Per Mathew, J.

I think there are rights which inhere in human beings because they are human beings—whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the peoplegave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance.

Part III—Directive Principles and Fundamental Rights (*contd.*)

of the country and all the organs of the State, including the judiciary, are bound to enforce those directives. The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values. (Para 1714)

The significant thing to note about Part IV is that, although its provisions are expressly made unenforceable, that does not affect its fundamental character. Enforcement by a Court is not the real test of a law. The conventions of English Constitution are not enforceable in a court of law but they are, nevertheless, binding and form part of the constitutional law of the land. The similarity between the constitutional conventions in England and Directive Principles of State Policy in India cannot be disputed. (Para 1701)

Judicial process is also "State action" under Article 37 and the judiciary is bound to apply the Directive Principles in making its judgment. (Paras 1703 and 1704)

Naresh v. *State of Maharashtra*, (1966) 3 SCR 744: AIR 1967 SC 1; *Shelley* v. *Kraemer*, 334 US 1; *Budhan* v. *State of Bihar*, (1955) 1 SCR 1045: AIR 1955 SC 191; *Carter* v. *Texas*, 177 US 442, 447 and *Backus* v. *Fort Street Union Depot Co.*, 169 US 557, *relied on*.

Per Beg, J.

It is not right to characterise the Fundamental Rights contained in Part III, as merely the means whereas the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution. On the other hand it would be more correct to describe the Directive Principles as laying down the path which was to be persued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble. Indeed, from the point of view of the Preamble, both the Fundamental Rights and the Directive Principles are means of attaining the objectives which were meant to be served both by the Fundamental Rights and Directive Principles. Fundamental Rights are the ends of the endeavours of the Indian people for which the Directive Principles provided the guidelines. It would be difficult to hold that, the necessarily changeable limits of the path, which is contained in the Directive Principles are more important than the path itself. (Paras 1800, 1801 and 1806)

Motilal v. *State of U. P.*, AIR 1951 All 257 & 296: ILR (1951) 1 All 269 and *Balwant Raj* v. *Union of India*, AIR 1968 All 14: (1967) 2 Lab LJ 363: 1968 Lab IC 9, *relied on*.

Perhaps, the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposed corresponding obligations upon the State and the Directive Principles, would be to look upon the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river, which could be mended or amended by displacements, replacements or curtailments or enlargements of any part according to the needs of those who had to use the path. (Para 1802)

Primarily the mandate in Article 37 was addressed to the Parliament and the State Legislatures, but, in so far as Courts of Justice can indulge in some judicial law making, within the interstices of the Constitution or any statute before them for construction, the Courts too are bound by this mandate. (Para 1802)

Per Dwivedi, J.

Article 31(4), (5) and (6) establish beyond doubt that the Constitution-makers intended to give ascendency to the Directive Principles of State Policy over Fundamental Rights. (Para 1943)

Part III—Directive Principles and Fundamental Rights (*contd.*)

Per Chandrachud, J.

Our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience. (Paras 2002 and 2120)

Regarding according a rightful place to Fundamental Rights which are now internationally recognised, the answer to this question must depend upon the stark urgency for striking a balance between the rights of individuals and the general good of the society. (Para 2003)

The basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. Fundamental Rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the ark of the constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. (Para 2120)

The Nation stands today at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it. (Para 2120)

PART IV—CONSTITUTION OF INDIA—ARTICLE 368—SCOPE, AMBIT, CONTENT AND EXTENT OF AMENDING POWER

A. Approach in the matter of determination of the scope, ambit and extent of amending power conferred on Parliament—Whether sociological approach prohibited—Consideration of political, economic and social aspects if barred—Search for an enduring meaning—Functional approach.

Per Sikri, C. J.

Though the question of extent of amending power of Parliament raises grave issues, the answer must depend on the interpretation of the words in Article 368, read in accordance with the principles of interpretation which are applied to the interpretation of a Constitution given by the people to themselves. (Para 13)

I do not propose to decide the validity of the amendment on the touchstone of any particular theory of political science, sociology, economics. Our Constitution is capable of being worked by any party having faith in democratic institutions. The touchstone will be the intention of the Constitution-makers, which we can discern from the Constitution and the circumstances in which it was drafted and enacted. (Para 340)

Per Hegde & Mukherjea, JJ.

The interpretation to be placed on a constitutional provision, particularly on a provision of such great importance as Article 368 must subserve national interest. It must be such as to further the objectives intended to be achieved by the Constitution and to effectuate the philosophy underlying it.

As regards the approach to be taken, on behalf of the petitioners it has been contended firstly that in the exercise of its powers under Article 368 as it stood before its amendment,

Part IV—Art. 368—Scope of amending power (*contd.*)

it was impermissible for Parliament to take away or abridge any of the rights conferred by Part III of the Constitution, and secondly that the power conferred on the Parliament under Article 368 did not permit it to damage or destroy any of the basic or fundamental features or essential elements of the Constitution.

While considering the correctness of the first contention, we shall not take into consideration the importance of the Fundamental Rights. On this aspect, our approach to Article 368 will be purely based on the language of Article 368 and Article 13. The importance or transcendental character of the Fundamental Rights as well as the implied or inherent limitations on the amending power, if any, will be considered while dealing with the second of the two alternative contentions. (Para 612)

Per Ray, J.

Well settled principles of construction in interpreting constitutions preclude limiting the language of the Constitution by political, juristic or social concepts independently of the language of the Constitution to be interpreted. (Para 899)

Deep Chand v. *State of U.P.*, 1959 Supp 2 SCR 8: AIR 1959 SC 648; *Queen* v. *Burah*, (1878) 5 IA 179; *A. G. for Ontario* v. *A.G. for Canada*, 1912 AC 571; *A.K. Gopalan* v. *State of Madras*, 1950 SCR 88: AIR 1950 SC 27; *Keshavan Madhavan Menon* v. *State of Bombay*, 1951 SCR 228: AIR 1951 SC 128 and *Benoari Lal Sharma*, 72 IA 57, *relied on.*

Per Jaganmohan Reddy, J.

In interpreting a provision the words used, the context in which it was used, the purpose which it intended to subserve in the scheme of the Constitution, will alone have to be considered. (Para 1093)

It is necessary to asceratin from the background of our national aspirations, the objectives adopted by the Constituent Assembly as translated into a working organic instrument which established a sovereign democratic Republic with a Parliamentary system of Government whereunder individual rights of citizens, the duties towards the community which the State was enjoined to discharge; the diffusion of legislative power between Parliament and State Legislatures and the provision for its amendment, *etc.*, are provided for. All these aspects were sought to be well balanced as in a ship built for fair weather as well as for foul. This then will be the proper approach. (Para 1124)

Per Palekar, J.

If the Constitution is to endure it must necessarily respond to the will of the people by incorporating changes sought by the people. (Para 1238)

Per Mathew, J.

Although the word 'amendment' has a variety of meanings, we have to ascribe to it in the article a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and to meet the various crises to which the body politic will be subject. (Para 1562)

Missouri v. *Rolland*, 252 US 416, 433, *relied on.*

In Re The Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, (1939) FCR 18; *Queen* v. *Burah*, (1878) 3 AC 889, 904-905, *referred.*

Per Beg, J.

In such a Constitution as ours, we must strongly lean against a construction which may enable us to hold that any part of the Constitution is exempt from the scope of Article 368 as originally framed. (Para 1825)

The proper function of Article 368, in a Constitution is to act as a safety valve against violent revolution. It can only so operate as a safety valve if we do not construe the powers

Part IV—Art. 368—Scope of amending power (*contd.*)

of amendment contained in it so narrowly as to import, contrary to the clear meaning of its explicit language, any bar against the alteration or change of any feature of our Constitution which may be characterised as basic. (Para 1824)

Per Chandrachud, J.

The core of social commitment is the quintessence of our Constitution and we must approach it in the spirit in which it was conceived. (Para 2016)

B. Rules of Constitutional interpretation considered for interpretation of Article 368.

General rules of interpretation of Constitutional provisions—Considerations of the history and the hopes and aspirations reposed in the Constitution—Uniqueness of Indian Constitution—Consideration of the whole scheme of the Constitution—Rival claims to be weighed—Broad and liberal spirit in interpretation—Determination of legislative intent behind the provision—Heydon Rule—Most beneficial interpretation to be given—Narrow construction to be avoided—Plain and commonsense meaning to be given.

Per Sikri, C. J.

One must interpret Article 368 in the setting of our Constitution, in the background of our history and in the light of our aspirations and hopes, and other relevant circumstances. Our Constitution is unique with its own peculiar situation. (Para 14)

In construing the expression "amendment of this Constitution" one must look at the whole scheme of the Constitution. It is not right to construe words in vacuum and then insert the meaning into an article. (Para 56)

Bidie v. *General Accident, Fire & Life Assurance Corporation*, (1948) 2 All ER 995, 998; *Bourne* v. *Norwich Crematorium*, (1967) 2 All ER 576, 578; *Towne* v. *Eisner*, 245 US 418, 425: 62 L Ed 372, 376; *In re Central Provinces & Berar Act*, 1938, 1939 FCR 18, 42: AIR 1939 FC 1 and *James* v. *Commonwealth of Australia*, 1936 AC 578, 613, *relied on.*

In the Constitution the word "amendment" or "amend" has been used in various places to mean different things. In some Articles, the word "amendment" in the context has a wide meaning and in another context it has a narrow meaning. (Para 62)

Mangal Singh v. *Union of India*, (1967) 2 SCR 109, 112: AIR 1967 SC 944, *followed.*

In view of the great variation of the phrases used all through the Constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the Constitution. One must look at the whole structure of the Constitution. (Paras 81 & 82)

Holmes v. *Jennison*, 10 L Ed. 579, 594; *William* v. *United States*, 77 L Ed. 1372, 1380, *relied on.*

Per Shelat & Grover, JJ.

While interpreting Constitutional provisions it is necessary to determine their width or reach; in fact the area of operation of the power, its minimum and maximum dimensions cannot be demarcated or determined without fully examining the rival claims. Unless that is done, the ambit, content, scope and extent of the amending power cannot be properly and correctly decided. (Para 483)

A Constitution is not to be construed in any narrow and pedantic sense. A broad and liberal spirit should inspire those whose duty it is to interpret it. (Para 506)

In re C. P. & Berar Sales of Motor Spirit and Motor Lubricants Taxation Act, 1938, (1939) FCR 18: AIR 1939 FC 1; *A.G. for New South Wales* v. *Brewery Employees Union of New South*

Part IV—Art. 368—Scope of amending power (*contd.*)

Wales, (1908) 6 CLR 469 at pp. 611-612 and *James* v. *Commonwealth of Australia*, (1936) AC 578 at p. 613, ***relied on.***

Per Hegde & Mukherjea, JJ.

While interpreting a provision in a statute or Constitution the primary duty of the court is to find out the legislative intent. In the present case our duty is to find out the intention of the founding fathers in enacting Article 368. Ordinarily the legislative intent is gathered from the language used. If the language employed is plain and unambiguous, the same must be given effect to irrespective of the consequences that may arise. But if the language employed is reasonably capable of more meanings than one, then the Court will have to call into aid various well settled rules of construction and, in particular, the history of the legislation to find out the evil that was sought to be remedied and also in some cases the underlying purpose of the legislation the legislative scheme and the consequences that may possibly flow from accepting one or the other of the interpretations because no legislative body is presumed to confer a power which is capable of misuse. (Para 638)

One must read the word "amendment" in Article 368 not in isolation but as occurring in a single complex instrument. Article 368 is a part of the Constitution. The various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368. (Para 639)

The Rule laid down in *Heydon's case* must be considered in determining the scope and extent of amending power. (Para 644)

Per Ray, J.

In interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of powers must be adopted. (Para 872)

Per Khanna, J.

It is an elemental rule of construction that while dealing with a constitution every word is to be expounded in its plain, obvious and commonsense unless the context furnishes some ground to control, qualify or enlarge it and there cannot be imposed upon the words any recondite meaning or any extraordinary gloss. (Para 1358)

Per Mathew, J.

Seeing that it is a "Constitution that we are expounding" and that the Constitution-makers had before them several Constitutions where the word 'amendment' or 'alteration' is used to denote plenary power to change the fundamentals of the Constitution, I cannot approach the construction of the word 'amendment' in Article 368 in a niggardly or pettyfogging spirit and give it a narrow meaning; but "being a familiar expression, it was used in its familiar legal sense". (Para 1564)

Henry v. *United States*, 251 US 393, 395, ***relied on.***

Per Chandrachud, J.

The rule of strict construction which applies to a penal or taxing statute is out of place in a Constitutional Act and a "construction most beneficial to the widest possible amplitude" of its power must be adopted. (Para 2060)

One should give to the Parliament the freedom, within the framework of the Constitution, to ensure that the blessings of liberty will be shared by all. It is necessary, towards that end, that the Constitution should not be construed in a "narrow and pedantic sense".

(Para 2016)

Foreign Constitutions, foreign cases and views of foreign authors and critics—Consideration of, in general, in Constitutional interpretation—Consideration of American, Irish, Canadian, Ceylonese and Australian Constitutional Law—Consideration of foreign treatises and articles.

Part IV—Art. 368—Scope of amending power (*contd.*)

Per Sikri, C. J.

Extracts from other Constitutions are of no use in interpreting Article 368. First the language and the setting of each Constitution is different. Apart from the decisions of the Courts in United States there are no judicial decisions to guide us as to the meaning of the amending clauses in these Constitutions. Further, if it is not helpful to argue from one Act of Parliament to another, much less would it be helpful to argue from one Constitution to another different Constitution. (Para 347)

Commissioner of Stamps, Straits Settlements v. ***Oei Tjong Swan***, (1933) AC 378, 889; *and* ***Bank of Toronto*** v. ***Lambe***, (1881) 12 AC 575-587, *relied on.*

Article V of the Constitution of the United States differs greatly from Article 368 of our Constitution. The U.S. Congress, a federal legislature, does not itself amend the Constitution. In India, the position is different. It is Parliament, a federal legislature, which is given the power to amend the Constitution. Besides there are express limitations on the amending power under Article V. In addition there are differences between the two Constitutions. (Paras 321 to 326)

The Americal decisions would have been of assistance if the fundamental question viz. Can Parliament in exercise of its powers under Article 368 abrogate essential basic features and one fundamental right after another including freedom of speech, freedom of religion, freedom of life had arisen there and if the power to amend the Federal Constitution had been with two-third majority of the Congress. (Para 327)

Hawke v. ***Smith***, 64 L Ed 871; ***Rhode Island*** v. ***Palmer***, 64 L Ed 946 and ***United States*** v. ***William H. Sargue*** 75 L Ed. 640, *distinguished.*

Ex parte Mrs. D. C. Kerby, 36 ALR 1451, 1455, *referred.*

Cases on the State Constitution in the U.S. are drafted in such different terms and conditions that it is difficult to derive any assistance. (Para 341)

Article 50 of the Irish Constitution is different to Article 368 in our Constitution. There are other basic differences between the two constitutions. (Paras 358 to 376, 385)

Jeremiah Ryan v. ***Captain Michael Lennon***, (1935) Irish Reports 170, *distinguished.*

Moore v. ***A. G. for the Irish Free State***, 1935 AC 484 *considered & explained.*

Edwards v. ***A. G. of Canada***, (1930) AC 124 and ***State (Ryan)*** v. ***Lennon***, (1935) Irish Reports 170, *referred.*

Views and comments of distinguished and well-known authors are not advantageous because the Indian Constitution must be interpreted according to its own terms and in the background of our history and conditions The Court must apply its own mind to the interpretation and consider arguments of both sides. (Para 346)

Per Shelat & Grover, JJ.

The whole scheme and language of Article 368 is quite different from the amending provisions in Constitutions of Canada, Australia, Eire, U.S.A. and Switzerland. It would be purely speculative or conjectural to rely on the use of the word "amend" or "amendment" in the Constitution of another country unless the entire scheme of the amending section or Article is also kept in mind. (Para 505)

The opinions of authors and writers have been cited before so extensively, by both sides, that we find a great deal of conflict in their expression of opinion and it will not be safe to place any reliance on them. (Para 572)

Per Hegde & Mukherjea, JJ.

The scheme of no two Constitutions is similar. Their provisions are not similar. The language employed in the amending clauses differ from Constitution to Constitution. The objectives lying behind them also bound to differ. Each country has its own needs, its own philosophy, it own way of life and above all its own problems. Hence we will be clouding the issues, if we allow overselves to be burdened either by the writings of the various writers on other Constitutions or by the decisions rendered on the basis of the provisions of the other Constitutions. (Para 659)

In our Constitution unlike in the Constitution of the United States of America the words "amendment" and "amend" have been used to convey different meaning in different places. Article V of the U.S. Constitution is not similar to Article 368 of our Constitution. (Paras 640 and 659)

Per Ray, J.

Our Constitution is of a sovereign independent republican country. Our Constitution does not draw sustenance from any other Constitution. Our Constitution does not breathe through conventions and principles of foreign countries. (Para 981)

Per Jaganmohan Reddy, J.

It is unsafe to rely on cases which arise under other Constitutions. It is not permissible to draw support from a provision of another Constitution which is differently worded. On the desirability of drawing heavily or relying on the provisions of the Constitutions of other countries or on the decisions rendered therein, a word of caution will be necessary. Law varies according to the requirements of time and place. Justice thus becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein. (Paras 1081, 1085 and 1107)

A comparison with Article V of the U.S. Constitution providing for an amendment of that Constitution, with Article 368 of our *Constitution*, would show that there is no resemblance between the amending procedure provided in either of them. Such a comparison would be misleading if one is to apply the concepts and dicta of the eminent Judges of the Supreme Court of the U.S. in interpreting our Constitution. (Para 1113)

The amending power under the *American Constitution* is difficult process in that it is vitally linked with its ratification by the people through their representatives in the State Legislatures or in the Conventions. These decisions, therefore, are of little practical utility in interpreting our Constitution which had devised altogether different methods of amendments. (Para 1108)

A reference to the provision relating to amendment either in the United States or in the States' Constitutions where people have a vital part in the amending process is inapt and inapplicable to the interpretation of our Constitution where the people have been designedly excluded. (Para 1126)

Per Dwivedi, J.

Decisions of foreign courts and treatises and articles written on various Constitutions by foreign writers would not be safe guides in construing our Constitution. (Para 1860)

Per Chandrachud, J.

As regards reference to foreign constitutions, there is no international yardstick with which to measure the width of an amending power. (Para 1999)

The decisions of American courts may bear examination, but in their application to the problems arising under our Constitution it would be necessary to keep in constant sight some of the crucial differences between the circumstances attendant on the birth of the two constitutions, the purposed vagueness of theirs and the finical content of ours and the significant disparity in the structure of their Article V and our Article 368. (Para 2011)

Several eminent writers and jurists have been cited. But the conflicting views of these writers, distinguished though they be, cannot conclude the controversy before us, which must be decided on the terms of our Constitution and the genius of our Nation. (Para 2001)

Consequences Theory in Constitutional interpretation—Consideration of consequences in deciding for or against an interpretation—Alternative interpretations—Choice between—Avoidance of absurdity and inconvenience—Whether the theory is inapplicable when provision clear and explicit—Whether theory of consequences includes consideration of policy, social and economic factors etc.

Per Sikri, C. J.

Court can consider if any of the possible interpretations to be placed would lead to an absurdity. (Paras 285 and 314)

Queen v. *Judge of City of London Court*, (1892) 1 QB 273-290 and *Grundant* v. *Great Boulder Proprietary Mines Ltd.*, (1948) 1 Ch 145, 159, *relied on.*

Vacher & Sons v. *London Society of Compositors*, (1913) AC 107; 117-118, *explained and distinguished.*

Grey v. *Pearson*, (1857) 6 HLC 61, 106; *Coke* v. *Charles A. Vogeler Co.*, (1901) AC 102 at 107; *Bank of Toronto* v. *Lambe*, (1887) 12 AC 575, 586, and *A. G for Alberta* v. *A. G. for Canada*, (1939) AC 117, 132, 133, *referred.*

Per Shelat & Grover, JJ.

Where two constructions are possible the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory. (Para 527)

State of Punjab v. *Ajaib Singh*, (1953) SCR 254 at page 264: AIR 1953 SC 10 and *Don John Francis Dougles Liyange* v. *The Queen*, (1967) 1 AC 259, *relied on.*

Bank of Toronto v. *Lambe*, (1887) 12 AC 575 at pp. 586-587, *referred.*

While analysing the scope and width of the power claimed by virtue of a constitutional provision, it is wholly immaterial whether there is a likelihood or not of India ceasing to be a Sovereign Democratic Republic. (Para 525)

The Supreme Court would not be drawn into discussing political aspects of the question. (Para 526)

Golak Nath v. *State of Punjab*, (1967) 2 SCR 762 at p. 850: AIR 1967 SC 1643, *relied on.*

It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. (Para 532)

Per Hegde & Mukherjea, JJ.

If the language employed is reasonably capable of more meanings than one, then the Court will have to call into aid various well settled rules of construction such as the consequences that may possibly flow from accepting one or the other of the interpretations because no Legislative body is presumed to confer a power which is capable of misuse. (Para 638)

If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power

Part IV—Art. 368—Scope of amending power (*contd.*)

granted then the Court has to take into consideration the consequences that might ensue by interpreting the same as an unlimited power. (Para 650)

Per Ray, J.

On the question of looking at the consequences of a particular interpretation the test of the true width of a power is not how probable it is that it may be exercised, but what can possibly be done under it. The hope and expectation that it will never be used is not relevant. (Para 836)

Where the language of an Act is clear and explicit, effect is to be given to it whatever may be the consequences. The words of the statute speak the intention of the Legislature. (Para 902)

The doctrine of consequences states that if any particular construction in construing the words of a statute was susceptible to more than one meaning, it was legitimate to consider the consequences which would result from any particular construction. The doctrine of consequences has no application in construing a grant of power conferred by a Constitution. In considering a grant of power the largest meaning would be given to the words of the power in order to effectuate it fully. The theory of consequences is misconstrued if it is taken to mean that considerations of policy, wisdom and social or economic policies are included in the theory of consequences. The construction to avoid absurdity must be used with great caution. (Paras 948 to 951)

Vacher & Sons v. *London Society of Compositors,* 1913 AC 107; *A.G. for Ontario* v. *A.G. for Dominions,* 1912 AC 571; *Bank of Toronto* v. *Lambe,* (1887) 12 AC 575, *Gross-man'* 69 L Ed 527: 267 US 86; *Kameshwar Singh* v. *State of Bihar,* 1952 SCR 889: AIR 1952 SC 252; *Grundt's case,* 1948 Ch 145, *relied on.*

If power is conferred which is in clear and un-ambiguous language and does not admit of more than one construction there can be no scope for narrowing the clear meaning and width of the power by considering the consequences of the exercise of the power and by so reading down the power. (Para 953)

Ross v. *Illison,* 1930 AC 1 and *Damselle Howard* v. *Illinion Central Rail Road Co.,* 207 US 463, *relied on.*

Per Jaganmohan Reddy, J.

There have again been arguments for taking consequences into consideration which really highlighted what would be the dire consequences if the result of the decision being one way or the other but this court ought not to be concerned with these aspects, if otherwise our decision is in accordance with the view of the law it takes. We should free ourselves of any considerations which tend to create pressures on the mind. (Para 1103)

Per Palekar, J.

Consequences may well be considered in fixing the scope and ambit of a power, where the text of the statute creating the power is unclear or ambiguous. Where it is clear and unambiguous, courts have to implement the same without regard to consequences good or bad, just or unjust. (Para 1263)

Vacher's case, 1913 AC 107, *relied on.*

Consequences of wreckless use of amending power are political in character with which the courts are not concerned. (Para 1263)

Per Khanna, J.

As regards the question as to how far the consequences have to be taken into account, it is one of the well-settled rules of construction that if the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their

Part IV—Art. 368—Scope of amending power (*contd.*)

natural and ordinary sense, the words themselves in such case best declare the intention of the legislature. It is equally well-settled that where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. (Para 1396)

Collector of Customs, Baroda v. *Digvijaysinghji Spinning & Weaving Mills Ltd.*, (1962) 1 SCR 896 (on p. 899) : AIR 1961 SC 1549, *relied on*

Per Beg, J.

The test of consequences or implied limitations or rules of natural justice can be invoked against ordinary law-making process but not against valid exercise of power constituent. (Para 1844)

Preamble of the Constitution as an aid in constitutional interpretation.

Preamble whether a source of limitations—Whether imposes implied limitations on the amending power (see infra).

Per Sikri, C. J.

In case the word "Amendment" in Article 368 is found ambiguous the Preamble can be referred to to find out the construction which will fit in with it. (Para 109)

Attorney-General v. *Prince Ernest Augustus of Hanover*, (1957) AC 436, 460; *State of Victoria* v. *The Commonwealth*, 45 ALJ 251, *relied on*.

The Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble. (Para 116)

Per Shelat & Grover, JJ.

The Preamble was meant to embody in a very few and well defined words the key to the understanding of the Constitution. (Para 506-A)

Our court has consistently looked to the Preamble for guidance and given it a transcendental position while interpreting the Constitution or other laws. (Para 516)

The true function of the Preamble is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantially to create them. (Para 522)

Apart from the historical background and the scheme of the Constitution the use of the Preamble has always been made and is permissible if the word "amendment" has more than one meaning. (Para 506)

Bidis v. *General Accident, Fire and Life Assurance Corporation*, (1948) 2 All ER 998, *relied on*.

If any provision in the Constitution had to be interpreted and if the expressions used therein were ambiguous, the preamble would certainly furnish valuable guidance in the matter, particularly when the question is of the correct ambit, scope and width of a power intended to be conferred by Article 368.

Per Ray, J.

The Preamble can expound the nature, extent and application of the powers actually conferred by the Constitution and not substantively create them. (Para 890)

If the language of the enactment is clear the Preamble cannot nullify or cut down the enactment. (Para 891)

Part IV—Art. 368—Scope of amending power (*contd.*)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88: AIR 1950 SC 27; *Coal Bearing Areas Act case*, (1962) 1 SCR 44: AIR 1961 SC 954; *State of Rajasthan* v. *Leela Jain*, (1965) 1 SCR 276: AIR 1965 SC 1296, *relied on*.

The Secretary of State for India in Council v. *Maharajah of Bobbili*, ILR 43 Mad 529: AIR 1919 PC 32: 46 IA 302; *Attorney-General* v. *Prince Ernest Augustus of Hanovar*, 1957 AC 436; *Hanning Jacobson* v. *Commonealth of Massachusetts*, 197 US 11, *referred to*.

Per Jaganmohan Reddy, J.

The preamble will furnish a guide to the construction of the statute where the words are ambiguous, or even where the words are unambiguous to aid a construction which will not lead to an absurdity. Where the preamble conveys a clear and definite meaning, it would prevail over the enacting words which are relatively obscure or indefinite or if the words are capable of more than one construction, the construction which fits the preamble may be preferred. (Para 1157)

Constituent Assembly Debates and Legislative Debates—As aids in Constitutional interpretation—Whether speeches of members conclusive of the interpretation—Use of speeches for confirmation of intended interpretation—Whether permissible—Use of speeches for determining history and object of the provision and mischief sought to be remedied.

Per Sikri, C. J.

It is a sound rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of provisions of the statute. The same rule has been applied to the provisions of this Constitution. Of course there is no harm in finding confirmation of one's interpretation in debates but it is quite a different thing to interpret the provisions of the Constitution in the light of the debates. The speeches can be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people. (Paras 179, 183 & 186)

State of Travancore-Cochin v. *Bombay Co. Ltd.*, 1952 SCR 1112, 1121: AIR 1952 SC 366, *followed*.

Administrator-General of Bengal v. *Prem Nath Mallick*, (1895) 32 IA 107-118; *A. K. Gopalan* v. *State of Madras*, (1950) SCR 38: AIR 1950 SC 27; *Golak Nath* v. *State of Punjab*, (1967) 2 SCR 762, 792, 922: AIR 1967 SC 1643; *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85; *Union of India* v. *H. S. Dhillon*, (1971) 2 SCC 779; *In re The Regulation and Control of Aeronautics in Canada*, (1932) AC 54, 70, *relied on*.

Per Shelat & Grover, JJ.

Nothing conclusive can emerge by referring to the speeches for the purpose of interpretation of the word "amendment". (Para 505)

Per Hegde & Mukherjea, JJ.

No conclusive inference can be drawn from the speeches during the Constituent Assembly debates as to the intention of those speakers. (Para 629)

Per Jaganmohan Reddy, J.

The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned.

The deliberations and the recommendations of the Committees, the proceedings of the Drafting Committee, and the speech of Dr. Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue. (Para 1088)

Per Palekar, J.

(Constituent Assembly Debates, *relied on*). (Para 1235)

Per Khanna, J.

Speeches made in the Constituent Assembly can be referred to while dealing with the provision of the Constitution. (Para 1367)

Golak Nath v. *State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC 1643; *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85 and *Union of India* v. *H. S. Dhillon*, (1971) 2 SCC 779, *relied on.*

The speeches in the Constituent Assembly can be referred to for finding the history of the constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. (Para 1368)

Per Mathew, J.

The question whether speeches made in the Constituent Assembly are admissible to ascertain the purpose behind a provision of the Constitution is not free from doubt. (Para 1596)

But there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which will resolve latent ambiguity in a provision of the Constitution and it would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision. (Paras 1597 & 1598)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88: AIR 1950 SC 27; *State of Travancore-Cochin* v. *Bombay Co. Ltd.*, 1952 SCR 1112: AIR 1952 SC 366, *considered.*

Golaknath case, (1967) 2 SCR 762, 791: AIR 1967 SC 1643; *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85; *Union of India* v. *Harbhajan Singh Dhillon*, (1971) 2 SCC 779 *and United States* v. *Fisher*, 2 Cranch 358, 386 US 1805, *Relied on.*

Per Chandrachud, J.

Debates of the Constituent Assembly and of the Provisional Parliament are not admissible as aids to construction of constitutional provisions. (Para 2137)

It is hazardous to rely upon parliamentary debates as aids to statutory construction. Different speakers have different motives and the system of 'Party whip' leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from the language it uses. Therefore, parliamentary proceedings can be used only for a limited purpose as explained in *Gopalan's case.* (Para 2140)

Marginal note in Constitutional interpretation

Per Hegde & Mukherjea, JJ.

Marginal note plays a very little part in the construction of statutory provision. It should have much less importance in construing a constitutional provision. (Para 620)

Part IV—Art. 368—Scope of amending power *(contd.)*

Per Ray, J.

In construing Article 368 the title of the part "Amendment of the Constitution" is an important aid to construction. The marginal note which speaks of the procedure of amendment is not complete by itself because the procedure when followed results in the product, namely, an amendment of the Constitution which is not only a matter of procedure. (Para 841)

Per Khanna, J.

The marginal note cannot control the scope of the article itself. The existence of a power cannot be denied by invoking the marginal note if it is otherwise clear from the scheme and language of the provision. (Para 1352)

Natural Law

Per Beg, J.

Natural law theory may not be used for putting a construction on Article 368 of the Constitution which will defeat its plain meaning as well as the objects of the Constitution as stated in the Preamble and the Directive Principles of State Policy. I do not know of any case in which this has been done. (Para 1846)

Contemporaneous practical exposition of Constitutional provision as a guide — Passing of First Amendment by the Constituent Assembly working as Provisional Parliament — Contemporaneous speeches and writings of framers of the Constitution with the passing of the First Amendment.

Per Hegde & Mukherjea, JJ.

It should be noted that the Parliament that passed the 1st Amendment was the constituent Assembly itself which formed Article 368 and which was continuing as a Provisional Parliament. (Paras 635, 636)

Per Ray, J.

Regarding the meaning and scope of Article 368 if there be any doubt contemporaneous practical exposition of the Constitution is too strong and obstinate to be shaken or controlled. (Para 871)

Mophereon v. *Blacker*, 146 US 1: 36 L Ed 869 and *Automobile Transport Ltd.* v. *State of Rajasthan*, (1963) 1 SCR 491, *relied on.*

Even in the First Constitution Amendment debate no one doubted change of amendment of fundamental rights. At no stage it appeared that fundamental rights are absolute. (Para 866)

Per Jaganmohan Reddy, J.

The fact that none of the members who were also members of the Provisional Parliament ever entertained a doubt as to the non-amenability of Part III when the Constitution (First Amendment) Bill was debated and later enacted as an Act is not relevant. (Para 1093)

Per Khanna, J.

The First Amendment provides clear evidence of how the provisions of Article 368 were construed and what they were intended and assumed to convey by those who framed the constitution and how they acted upon the basis of the said intention and assumption soon after the framing of the Constitution. The contemporaneous practical exposition furnishes considerable aid in resolving the said doubt and construing the provisions of the article. (Para 1365)

William McPherson v. *Robert R. Blacker*, 146 US 1, *relied on*

Part IV—Art. 368—Scope of amending power (*contd.*)

Per Mathew, J.

Even at the time of the passing of the 1st Amendment abridging Articles 15 & 19, even strong opponents did not suggest that Part III was not amendable. Contemporaneous practical exposition is a valuable aid to the meaning of a provision of the Constitution or a statute (Para 1594)

Per Chandrachud, J.

Contemporaneous practical exposition of the Constitution cannot relieve the judiciary of the task of interpreting the Constitution. It is for the judiciary to determine the true legal position. (Paras 2005, 2006)

Precedents in Constitutional Interpretation—Value of earlier decisions— Stare Decisis—Value of earlier decisions of the Supreme Court.

Per Chandrachud, J.

Our principal task is to construe the Constitution and not to construe judgments. Those judgments are, without doubt, like lamp-posts on the road to freedom and judges who have shed on that road the light of their learning and the impress of their independence, have carved for themselves a niche in the history of civil liberties. (Para 2016)

Dictionaries and Law Lexicons as aids in Constitutional interpretation.

Per Shelat & Grover, JJ.

It is more proper to look for the true "meaning" of the word "amendment" in the Constitution itself rather than in the dictionaries. (Para 496)

Per Chandrachud, J.

It is not true that mere dictionaries will help one understand the true meaning and scope of words like 'amendment' in Article 368 or 'law' in Article 31(2). These are not words occurring in a school text-book so that one can find their meaning with a dictionary on one's right and a book of grammer on one's left. These are words occurring in a Constitution and one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instruement, in which one part may throw light on another", so that "the construction must hold a balance between all its parts". Such words, having so significant an impact on a power as important as the power to amend the Constitution cannot be read in vacuo. (Para 2017)

'Amendment' is undoubtedly not a term of art and the various dictionaries, texts and law-lexicons cited before us show that the word has several shades of meaning (Para 2044)

These texts and authorities are useful in that they bring a sense of awareness of the constructional difficulties involved in the interpretation of a seemingly simple word like 'amendment'. But enriched by such awareness, we must in the last analysis go to our own organic document for determining whether the word 'amendment' in Article 368 is of an ambiguous and uncertain import. (Para 2047)

International Law and Comity of Nations—Consideration in Constitutional interpretation

Per Khanna, J.

It is only in cases of doubt or ambiguity that the courts would interpret a statute so as not to make it inconsistent with the comity of nations or established rules of International law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and International law which results. (Para 1467)

Part IV—Art. 368—Scope of amending power (*contd.*)

C. Source of Amending power

Article 368 and Articles 245 to 248—Whether the source of power is Article 248 read with Entry 97 of List I or Article 368 itself—View of Golak Nath Case in this regard—Location of power in Article 368 made explicit by 24th Amendment—Whether renders the question academic—Question if disputed by the Petitioner—Whether location of the amending power really necessary—Provision of ratification by the States—Inference.

Marginal note—Effect—Validity of 24th Amendment (see infra).

Effect of source of power on the amending power and in particular amendment of Part III—Source if decides whether constitutional amendment is 'law'—Arts. 13(2) & 368 (see infra)

Per Sikri, C.J.

Counsel for the petitioner rightly conceded that Parliament could validly amend Article 368 to transfer the source of amending power from List I, Entry 97 to Art. 368. (Para 389)

The Constitution (Twenty-Fourth Amendment) Act, 1971, insofar as it transfers power to amend the Constitution from the residuary entry (Entry 97, List I) or Article 248 of the Constitution to Article 368, is valid; in other words Article 368 of the Constitution as now amended by the Twenty-Fourth Amendment deals not only with the procedure for amendment but also confers express power on Parliament to amend the Constitution. (Para 37)

Per Shelet & Grover, JJ.

The validity of the *Golak Nath* view that amending power resided in Article 248 read with Entry 97, List I need not be considered owing to the concession made on behalf of the petitioner that by amendment of Article 368 such a power could be validly located in that article even if it be assumed that it did not originally reside there. (Para 493-A)

Per Hegde & Mukherjea, JJ.

The power to amend the Constitution is located in Article 368. It is wrong to place reliance on Article 245, Article 246 and Article 248 and Entry 97 of List I for the purpose of locating the power of amendment in the residuary power conferred on the Union.

Sankari Prasad Singh Deo v. *Union of India and State of Bihar*, 1952 SCR 89: AIR 1951 SC 458; *Sajjan Singh* v. *State of Rajasthan*, (1965) 1 SCR 933: AIR 1965 SC 845; *I. C. Golaknath* v. *State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC 1643; *Don John Francis Douglas Liyanage* v. *The Queen*, (1967) 1 AC 259 at 287 and *State of U. P.* v. *Manlodhan Lal Srivastava*, 1958 SCR 533 at 544: AIR 1957 SC 912, *relied on.*

Article 368 does not expressly confer power to amend, the power is necessarily implied. (Para 620)

Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution. No undue importance should be attached to the marginal note which says "Procedure for amendment of the Constitution". As the power to amend under the article as it originally stood was only implied, the mariginal note rightly referred to the procedure of amendment. The reference to the procedure in the mariginal note does not negative the existence of the power implied in the article. (Para 620)

Article 245 to Article 248 as well as the Lists in the VIIth schedule merely deal with the legislative power and not with the amending power. (Para 619)

The 24th amendment has not made any material change in Article 36 as it stood originally. It is true the original article did not say specifically that the power to amend rested with Parliament. But whether an enactment refers to the three components of

Part IV—Art. 368—Scope of amending power *(contd.)*

Parliament separately or whether all the three of them are compendiously referred to as Parliament, in law it makes no difference. (Para 673)

Per Ray, J.

The constituent power under the Constitution belonged to Parliament because the Constitution gave it. The 24th Amendment made explicit what the judgment in *Sankari Prasad case* and the majority judgment in *Sajjan Singh case* and the dissenting judgments in *Golak Nath case* said, namely, that Parliament has the constituent power to amend the Constitution. *Golak Nath case* raised a doubt as to the meaning of the word "amendment". The 24th Amendment has expressly clarified that doubt. (Paras 913 and 914)

Per Jaganmohan Reddy, J.

That Article 368 contains the power and the procedure of amendment can admit of little doubt, as was held in *Golaknath case* by five Judges and Hidayatullah, J. (Para 1094)

Per Palekar, J.

It is not correct to say that amending power is found in Article 248 read with List I, Entry 97. The peculiar or special power to amend the Constitution is to be sought in Article 368 only and not elsewhere. The power and the procedure to amend the Constitution are in Article 368. (Paras 1225, 1226 and 1229)

Per Khanna, J.

The words in Article 368 "the Constitution shall stand amended in accordance with the terms of the Bill" clearly indicate that the said article provides not merely the procedure for amending the Constitution but also contains the power to amend Article 368. (Para 1350)

If the argument were to be accepted that the power to amend the Constitution is contained in Article 248, read with item No. 97, List I, it would be difficult to make amendment of the Constitution because the amendment would in most of the cases be inconsistent with the article proposed to be amended. But in Article 368 the provision of ratification negatives legislative process. Ratification by a State of constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to the proposed amendment. (Para 1351)

Further the existence of such a power which can clearly be discerned in the scheme and language of Article 368 cannot be ruled out or denied by invoking the marginal note of the article. (Para 1352)

By the very nature of things, the power to amend the Constitution cannot be in the residuary entry in a federal Constitution because the power to amend the Constitution would also include the power to alter the distribution of subjects mentioned in different entries. Such a power can obviously be not a Legislative power. (Para 1354)

In re the Central Provinces and Berar Sales of Motor Sprit and Lubricant Taxation Act, 1939. (1939) FCR 18: AIR 1939 FC 1.

So Article 368 prescribes not only the procedure but also confers power of amending the Constitution. (Para 1356)

Irrespective of the source of power, the words in Article 368 that "the Constitution shall stand amended" indicate that the process of making amendment prescribed in Article 368 is a self-executing process. The article shows that once the procedure prescribed in that article has been complied with, the end product is the amendment of the Constitution. (Para 1357)

Per Mathew, J.

There could be no doubt that Article 368 as it stood before the 24th Amendment contained not only the procedure but also the substantive power of amendment. The legislative power of Parliament under Entry 97 of List I of the Seventh Schedule is exclusive and the power to amend cannot be located in that entry because, in respect of the matters covered by the proviso to Article 368, Parliament has no exclusive power to amend the Constitution. (Paras 1571 and 1583)

Per Dwivedi, J.

The amending power resides in the original Article 368. (Para 1870)

Who can bring about a certain result may truly be said to have the power to produce that result. Power to amend the Constitution is accordingly necessarily implied in Article 368. (Para 1871)

Residuary power is intended to comprehend matters which could not be foreseen by the Constitution-makers at the time of the framing of the Constitution. (Para 1873)

It is necessary to consider whether the majority decision in *Golaknath case* is correct. (Para 1869)

Per Chandrachud, J.

The history of the residuary power since the days of the Government of India Act, 1935, and the scheme of distribution of legislative power show that if a subject of legislative power was prominently present to the minds of the framers of the Constitution, it would not have been relegated to a Residuary Entry, but would have been included expressly in the legislative list—more probably in List I. Article 368, which is the only article in Part XX must be held to deal both with the procedure and the product of that procedure. (Para 2041)

People of India as the repository of amending power—Parliament's amending power if therefore limited—Otherwise whether Parliament a true representative of the people of India—Whether people of India delegated their amending power to it—Factual position—Verdict at the polls if a mandate from the people—Whether direct involvement of the people in amending process essential—Need for referendum—Golak Nath case.

Per Sikri, C. J.

Can we say that an amendment made by Parliament is an amendment made by the people ? This is one of the matters that has to be borne in mind while considering the proper meaning to be given to the expression "amendment of this Constitution" in Article 368 as it stood before its amendment by the 24th Amendment. (Para 325)

There is no direct consultation of the people's will in Article 368 of our Constitution. (Para 374)

Per Shelat & Grover, JJ.

It cannot be overlooked that the basic theory of our Constitution is that "Pouvoir Constituent", is vested in the people and was exercised, for and on their behalf by the Constituent Assembly for the purpose of framing the Constitution. (Para 539)

State of Rhode Island v. *A. Mitchel Palmer*, 64 L Ed 946 and *United States* v. *William H. Sprague & William J. Howey*, 75 L Ed 640, 644, *distinguished.*

J. J. Dhillon v. *R. W. Gloss*, 65 L Ed 994, *explained.*

Per Hegde & Mukherjea, JJ.

The contention on behalf of the Union and the States that the two-thirds of the members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable. (Para 653)

During the General Elections to Parliament in 1952, 1957, 1962 and 1967, no proposal to amend the Constitution appears to have been placed before the electorate. Even when

Part IV—Article 368—Scope of amending power (*contd.*)

proposals for amendment of the Constitution are placed before the electorate as was done by the Congress Party in 1971, the proposed amendments are not usually placed before the electorate. Under these circumstances a mandate to the party to amend the Constitution in any particular manner is unjustified. (Para 663)

The assertion that either the majority of members of Parliament or even 2/3rd members of Parliament speak on behalf of the nation has no basis in fact. It will not be correct to say that whenever Parliament amends the Constitution, it must be held to have done it as desired by the people. There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adapt the Constitution to respond to the growing needs of the people. (Paras 664 and 665)

Per Ray, J.

A Constitution can be amended only in accordance with the process laid down in the Constitution. No other method is constitutionally possible than that indicated in the provision for amendment of the Constitution. Once the Constitution has vested the power to amend in the bodies mentioned therein that is the only body for amending the Constitution. The people who gave the Constitution have expressed how it is to be changed. (Para 796)

The people expressed in the Preamble to our Constitution gave the Constitution including the power to amend the Constitution to the bodies mentioned in Article 368. These bodies represent the people. (Para 854)

As long as Article 368 may be amended under proviso (*e*) any amendment of the Constitution by recourse to referendum would be revolutionary. (Para 927)

The amending body to amend the Constitution represents the will of the people. The concept of popular sovereignty is well settled in parliamentary democracy and it means that the people express their will through their representatives elected by them at the general election as the amending body prescribed by the Constitution. (Paras 926 and 927)

Per Palekar, J.

When the people through the constituent assembly granted the power to amend, they made no reservations in favour of the people. The people completely withdrew from the process of amendment. In other words, the grant of power was without reservation. (Para 1241)

Per Mathew, J.

It is difficult to agree with the proposition of counsel that the *legal sovereignty* under the Constitution resides in the people, or, that as ultimate legal sovereign the people can constitutionally change the basic structure of the Constitution even when the Constitution provides for a specific mechanism for its amendment. In the last analysis, perhaps, it is right to say that if sovereignty is said to exist in any sense at all, it must exist in the Amending Body. (Para 1608)

The people are possessed of their right to govern themselves in an inherent and permanent manner, their representatives are invested with power which exists in the people, but in a vicarious manner. I will assume that the people, by designating their representatives and by transmitting to them the power to amend the Constitution, did not lose or give up possession of their inherent constituent power. The Constitution, when it exists, is supreme over the people and, as the people have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it, and have directly placed that power in their representatives without reservation, it is difficult to understand how the people can juridically resume the power to continue to exercise it. (Paras 1610 and 1612)

If the legal source for the validity of the Constitution is not that it was framed by the people, the amending provision has to be construed on its own language, without reference to

Part IV—Article 368—Scope of amending power (*contd.*)

any extraneous consideration as to whether the people did or did not delegate all their constituent power to the Amending body or that the people reserved to themselves the Fundamental Rights. (Para 1604)

Per Dwivedi, J.

The procedure prescribed in Article 368 is the exclusive procedure for amendment of the Constitution. The word 'only' in Article 368 rules out all other procedures for amendment. So no law can be made for a referendum or a constituent assembly. A referendum or a constituent assembly will reduce Article 368 to redundance. (Para 1784)

D—Article 368—Components of

Per Hegde & Mukherjea, JJ.

Article 368 has three components; firstly, it deals with the amendment of the Constitution; secondly, it designates the body or bodies' which can amend the Constitution, and lastly, it prescribes the form and the manner in which the amendment of the Constitution can be affected. (Para 620)

E—Article 368—"amend" and "amendment"—Meaning and scope—Factors considered in determination of

Historical aspect—National movement in India.

Per Shelat & Grover, JJ.

A review of political and constitutional development from 1934 would be helpful in determining the scope and extent of amending power. (Paras 484 to 486, 488)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 at pp. 96-97: AIR 1950 SC 27; *Special Reference No. 1 of 1964*, (1965) 1 SCR 413 at p. 445: AIR 1965 SC 747 and *Ram Jawaya Kapur* v. *State of Punjab*, (1955) 2 SCR 225 at p. 236: AIR 1955 SC 549, *relied on.*

Per Ray, J.

The background in which Article 368 was enacted by the Constituent Assembly has an important aspect on the meaning and scope of the power of amendment. (Para 862)

Per Khanna, J.

It cannot be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and the poor is a recent phenomenon. On the contrary, this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. (Para 1482)

Per Dwivedi, J.

The Constitution bears the imprint of the philosophy of our National Movement for Swaraj. That philosophy was shaped by two prominent leaders of the Movement—Mahatma Gandhi and Jawaharlal Nehru. In sum, the National Movement was committed: (1) to work for social, economic and political equality of the weaker sections of the people; (2) to disperse concentration of wealth in any form in a few hands; and (3) to acquire property in accordance with law. Payment of compensation would be determined by equitable considerations and not by market value. The men who took the leading part in framing the Constitution were animated by these noble ideals. They embodied them in the Preamble to the Constitution; they proliferated them in the Directive Principles of the State Policy; they gave them ascendancy over the rights in Part III of the Constitution. They made them 'fundamental' in the governance of the country. Pandit Govind Ballabh Pant called them 'vital principles'. And indeed so they are, for when translated into life, they will multiply the number of owners of Fundamental Rights and transform liberty and equality from a privilege into a universal human right. (Paras 1863 and 1867)

Draft article of Article 368 and development through the Constituent Assembly.

Per Ray, J.

From the background of enactment of Article 368 the following emerges:

First, the Constituent Assembly made no distinction between essential and non-essential features. Secondly, no one in the Constituent Assembly said that fundamental rights could not be amended. The framers of the Constitution did not have any debate on that. Thirdly, even in the First Constitution Amendment debate no one doubted change of amendment of fundamental rights. At no stage it appeared that fundamental rights are absolute. Proceedings in the Constituent Assembly show that the whole Constitution was taken in broad prospective and the amendments fell under three categories providing for simple majority, or two-thirds majority or two-thirds majority and ratification by the States. These different procedures were laid down to avoid rigidity. (Paras 866 and 869)

Per Khanna, J.

The drafting Committee made express provision for limitation in case it was desired. The fact that in the Constitution as ultimately adopted, there was no provision either in Article 368 or in any other article containing a limitation on the power of amendment shows that no such limitation was intended. (Paras 1361 and 1365)

Per Dwivedi, J.

The history of Article 368 supports the broadest construction of the word "amendment". (Para 1896)

Per Chandrachud, J.

In the draft Constitution, the word 'amend' included the power of addition, alteration and repeal. (Para 2057)

We cannot pass on the amplitude of the power of amendment of the Constitution by considering what amendments were moved to the corresponding Article 13 of the Constitution and why those proposals for amendment were dropped or not pursued. Similarly, the fact that the First Amendment to the Constitution was passed in 1951 by members of the Constituent Assembly sitting as the Provisional Parliament cannot relieve us of the task of judicially interpreting the validity of the contention that the Fundamental Rights cannot be abridged or taken away or that the core of the essential features of the Constitution cannot be damaged or destroyed.

The debates of the Constituent Assembly and of the first Provisional Parliament on which none declined to rely furnished a lively experience.

The true legal position is for us and none else to decide, though within the limits set by the Constitution. (Paras 2005 and 2006)

Omission to use the composite term "amend by way of addition, variation or repeal" in Article 368—Use of the expression "amendment" and the composite expression in other articles of the Constitution such as Articles 4(1)(2), 107(2), 108(1) & (4), 109(3) & (4), 110(1)(b), 111 Proviso, 114(2), 147, 169(2), 196(2), 198(3) & (4), 199(1)(b), 200, 201, 204(2), 207(1)(2)(3), 240(2), 274(1), 304(b), 349 and 350—Inference—Clarification by 24th Amendment—Amendment in Articles 4, 169, Schedule V and Schedule VI not deemed amendment of the Constitution—Inference.

Part IV—Article 368—Scope of amending power (*contd.*)

Per Shelat & Grover, JJ.

The omission of use of the composite expression "to amend by way of addition, variation or repeal" in Article 368 cannot be considered conclusive for determining the meaning of the word "amendment" in Article 368. The word "amendment" has been used in a narrower sense in Article 4.

Mangal Singh v. *Union of India*, (1967) 2 SCR 109 at p. 112: AIR 1967 SC 944, *relied on.*

"Amendment" as used in Articles such as Articles 107, 111, 169 and Schedules V and VI, etc. could only have a limited meaning as is apparent from the context. (Para 500)

The statement in the articles and provisions containing the amending power other than Article 368 that any amendment made under those Articles would not amount to an amendment under Article 368 merely embodied the distinction that one category could be amended by the Parliament by a bare majority and all the other articles could be amended by the said body but only by following the form and manner prescribed by Article 368. (Para 502)

Per Hegde & Mukherjea, JJ.

It is true that the power conferred under Articles 4, 169 and Para 7 of Schedule V and Para 21 of Schedule VI is amending power but those provisions make it clear that the exercise of the power under those provisions shall not be "deemed to be the amendment of the Constitution for the purpose of Article 368". These words merely mean that the form and manner prescribed in Article 368 need not be complied with. Once this position is accepted, any law made under those provisions takes the character of an ordinary law and that law becomes subject to the other provisions of the Constitution including Article 13(2).
(Paras 627 and 628)

In some Articles the words "amend" and "amendment" are used to confer a narrow power, a power merely to effect changes within prescribed limits—see Articles 4, 107(2), 111, 169(2), 196(2), 197(2) and 200. Under Paragraph 7 of the Fifth Schedule as well as Paragraph 21 of the Sixth Schedule to the Constitution, a much larger power to amend those Schedules has been conferred on Parliament. That power includes power to amend "by way of addition, variation or repeal". Similar is the position under the repealed Article 243(2), Article 252(2) and 350(5). Our Constitution-makers made a distinction between a mere power to amend and a power to amend by way of "addition, modification or repeal". If different words are used in the same statute, it is reasonable to assume that, unless the context otherwise indicates, the legislature intended to convey different meanings by those words. This rule of interpretation is applicable in construing a Constitution as well.
(Para 640)

Per Ray, J.

The expression "amendment" has been used in several Articles of the Constitution. In every case amendment is to be by way of variation, addition or repeal. The contention that the word "amendment" in Article 368 should bear a limited meaning in view of the expression "amend by way of addition, variation or repeal of any of the provisions of this Schedule" occurring in Paragraphs 7 and 21 in Schedules 5 and 6, is unsound.
(Paras 840 and 844)

The phrase that "no such law shall be deemed to be an amendment" in Articles 4, 169 and Para 7 of Schedule V and Para 21 of Schedule VI contains intrinsic evidence that the meaning of the word "amendment" in Article 368 includes amendment by way of addition alteration or repeal. (Para 841)

Per Palekar, J.

In other articles like Articles 4, 169, Para 7 of Schedule V and Para 21 of Schedule VI power is granted to the Parliament to amend specific provisions 'by law' i. e. by adopting

Part IV—Article 368—Scope of amending power (*contd*)

the ordinary procedure of legislation, though it altered certain provisions of the Constitution. The alterations are 'a law' made by the Parliament and, therefore, liable to be struck down, unless specifically saved, in case of inconsistency with the provisions of the Constitution. Secondly in every such case a provision is deliberately added explaining that the amendment so made by law is not to be deemed an amendment of the Constitution for the purpose of Article 368. The meaning of the word 'amendment of the Constitution' cannot be less than 'amendment by way of addition, variation or repeal of any provision of the Constitution' which is the clarification of that expression accepted by the Constitutional 24th Amendment. (Paras 1226 and 1240)

Textually the provisions in the Schedules V and VI would stand amended. But this amendment is carried out 'by law'. On the other hand, if even a word in any provision of the Constitution is changed in accordance with Article 368, it is not described as an amendment of the provision but an Amendment of the Constitution with all its wide connotations. (Para 1258)

To say that the word 'amendment' in 'amendment of the Constitution' is used in a low key because padding words like amendment "by way of addition, variation or repeal" are used elsewhere in the Constitution would be to ignore the status of the word amendment when used in the context of amending the Constitution. Indeed the expression "amendment by way of addition, variation or repeal" would also amount to 'amendment'. But it is more appropriately used when some distinct provisions of a statute are under consideration and even the extreme limit of a repeal of such provisions is contemplated. In the case of an amendment of the Constitution this extreme limits of the repeal of the Constitution is not ordinarily contemplated. (Para 1258)

Per Mathew, J.

Amendments made under Articles 4 and 169, Paragraph 7 of the Fifth Schedule and Paragraph 21 of the Sixth Schedule are not amendment under Article 368 because the procedure prescribed by them is different from the procedure laid down in Article 368. The sub-paragraphs show clearly that the expression 'amend by way of addition, variation or repeal' in Para 7(1) of Schedule V and Para 21(1) of Schedule VI has the same content as the word 'amendment' in Article 368. (Paras 1565 and 1570)

Per Beg, J.

I am not attracted by the distinction between amendments, which are "deemed" not to be amendments, falling within Article 368, mentioned in the Fifth and Sixth Schedules, and actual amendments covered by Article 368. The word "deemed" was used in these provisions and Articles 4 and 169 merely to indicate that the procedure required by Article 368 was not required here. These provisions certainly furnish an aid in construing and fixing the meaning of the word "amendment" wherever used in the Constitution. And, the scope of amendment must necessarily be wide in the context of the whole Constitution. (Para 1830)

Per Dwivedi, J.

The words "amendment" and "amend" have been used in Articles 107(2), 108(1) and (4), 109(3), 110(1)(*b*), proviso to Article 111, Article 147, 196(2), 197(1)(*c*) and (2)(*c*), 198(3), 199(1)(*b*), 200, 201 and 395. In all these provisions those words include the power of repeal or abrogation. In Para 7(1) of Schedule V the words, "addition, variation or repeal" do not enlarge the meaning of 'amend' · they are expositive of it. Parliament may repeal any provision of Schedule V by an ordinary law enacted under Paragraph 7 of Schedule V or by an amendment under Article 368. The amending power under Article 368 which provides for amendment of the Constitution by a more difficult procedure than the one by which any provision of Schedule V may be repealed under Paragraph 7 cannot surely be narrower than the power under Paragraph 7 of Schedule V. The same consideration equally applies to Paragraph 21 of Schedule VI to the Constitution. (Paras 1891 and 1893)

Part IV—Article 368—Scope of amending power (*contd.*)

In re Berubari Union case, (1960) 3 SCR 250, 282: AIR 1960 SC 845: 1960 SCJ 933, *relied on.*

Per Chandrachud, J.

Two things emerge from the provisions of Paragraphs 7 and 21 of the Fifth and Sixth Schedules. Firstly, that the concept of "amendment" as shown by clause (1) takes in "addition, variation or repeal" and secondly, that an amendment even by way of "addition, variation or repeals" would fall within the terms of Article 368. It is expressly excepted from the scope of that article so that it may not fall within it, which it otherwise would. Schedules V and VI of the Constitution are in fact a constitution within a constitution.
(Paras 2051 and 2072)

The expression "amendment" was used in a large number of articles of the Constitution as originally enacted. Articles 4(1)(2), 108(4), 109(3)(4), 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1)(2)(3), 240(2), 274(1), 304(*b*) and 349. A reference to the content and the subject-matter of these articles would show that in almost every one of the cases covered by these articles, 'amendment' would be by way of addition, variation or repeal.
(Para 2052)

Provisions of Article 368 itself.

Per Sikri, C. J.

The Proviso to Article 368 throws some light on the problem. First, it uses the expression "if such amendment seeks to make any change in"; it does not add the words "change of", or omit "in", and say "seeks to change" instead of the expression "seeks to make any change in".
(Para 47)

Per Jaganmohan Reddy, J.

Article 368 empowers only a change in the Constitution as is evident from the proviso.
(Para 1150)

Per Palekar, J.

The proviso to the Article 368 clearly implies that an amendment under Article 368 *seeks to make a change* in the provisions of the Constitution.
(Para 1257)

Per Mathew, J.

The proviso to Article 368 used the expression 'change' and that would indicate that the term 'amend' realy means 'change'. The main part of Article 368 thus gave power to amend or to make change in the Constitution.
(Para 1555)

Rhode Island v. *Palmer,* 253 US 350; *State* (*at the Prosecution of Jeremiah Ryan*) v. *Captain Michael Lennon,* 1935 Irish Reports 170, *referred.*

Per Chandrachud, J.

It seems to me that in the context in which word 'amendment' occurs in Article 368, it is neither ambiguous nor amorphous, but has a definite import. The proviso to Article 368 furnishes intrinsic evidence to show that the word 'amendment' is used in that article not in a narrow and insular sense but is intended to have the widest amplitude.
(Paras 2048 and 2049)

Conclusions as to the meaning of 'amend' and 'amendment' in Article 368.

Per Sikri, C. J.

That meaning of "amendment" would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights.
(Para 209)

Part IV—Article 368—Scope of amending power (*contd.*)

It has been conceded by the respondent State that the whole Constitution cannot be abrogated or repealed and a new one substituted. In other words, the expression 'Amendment of this Constitution'' does not include a revision of the whole Constitution. (Para 209)

Therefore reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word ''amendment'' in the widest sense. (Para 282)

Per Shelat & Grover, JJ.

The word Amendment does not connote a single but several meanings. One has to determine its true meaning as used in the context of Article 368 by taking assistance from other permissible aids of construction. (Paras 505 and 506)

The meaning of the words ''amendment of this Constitution'' as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various Articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution. Even the concession on behalf of the respondents that the whole Constitution cannot be abrogated or repealed and a new one substituted supports the conclusion that the widest possible meaning cannot be given to it. (Para 546)

The entire discussion from the point of view of the meaning of the expression ''amendment'' as employed in Article 368 and the limitations which arise by implications leads to the result that the amending power under Article 368 is neither narrow nor unlimited. (Para 583)

Per Hegde & Mukherjea, JJ.

When the language of Article 368 is plain, no question of construction of that article arises. There is no need to delve into the intention of the Constitution-makers. (Para 633)

We are unable to construe the amending power in a narrow or pedantic manner. That power, under any circumstances must receive a broad and liberal interpretation. How large it should be a question that requires closer examination. (Para 634)

The word ''amendment'' like most words in English or for that matter in any language, has no precise meaning. ''Amendment'' is not a term of law. It is capable of receiving a wide meaning as well as a narrow meaning. The power to amend a Constitution in certain context may include even a power to abrogate or repeal that Constitution. It may under certain circumstances mean a power to effect changes within narrow limits. It may sometimes mean a power that is quite large but yet subject to certain limitations. To put it shortly, the word ''amendment'' without more, is a colourless word. It has no precise meaning. It takes it colour from the context in which it is used. It cannot be interpreted *in vacuo*. Few words in English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of the context. (Para 639)

Towns v. Eisner, 245 US 418 at 425, *relied on*.

So the power to amend the Constitution under Article 368 as it stood before its amendmend empowered the Parliament by following the form and manner laid down in that article, to amend each and every article and each and every part of the Constitution. Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution. (Para 744)

Part IV—Article 368—Scope of amending power (*contd.*)

Per Ray, J.

A broad definition or the word "amendment" will include any alteration or change. The word "amendment" when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular Article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular Article or clause. (Para 839)

The term "amendment" connotes a definite and formal process of constitutional change. (Para 861)

The meaning and scope of amending power is in the object and necessity for amendment in a written Constitution. (Para 848)

The expression "amendment of this Constitution" in Article 368(2) has a clear substantive meaning in the context of a written Constitution and it means that any part of the Constitution can be amended by changing the same either by variation, addition or repeal. The word "amend" is used in a Constitution to mean any kind of change. (Paras 845 and 846)

Amendment not only means alteration, addition or repeal of provision but also deletion of some part, partial repeal and addition of a new part. (Para 910)

Per Jaganmohan Reddy, J.

It is apparent that the word 'amendment' as used in Article 368 does not connote a plenitude of power. (Para 1149-A)

The attempt to restrict the meaning of the word 'amendment' to 'improvement' has been rejected by five of the learned Judges in *Golaknath's case.* (Para 1130)

Per Palekar, J.

The expression "amendment of the Constitution" is well known in modern constitutions and it is commonly accepted as standing for the alteration, variation or change in its provisions. Having regard to the object of providing an amendment clause in a modern constitution, amendment must stand for alteration and change in its provisions. (Paras 1239 and 1256)

Per Khanna, J.

The word amendment when used in reference to a constitution signifies change or alteration. (Para 1436)

Per Mathew, J.

There is no reason to think that the words 'amendment' was used in any narrow sense in Article 368 and that the power to amend under the article was in any way limited. If there is power, the fact that it might be abused is no ground for cutting down its width. (Para 1662)

Vacher & Sons v. *London Society of Compositors,* 1913 AC 107 at pp. 121 & 118; *Bank of Toronto* v. *Lambe,* (1887) 12 AC 575, 586 and *Ex parte Crossman,* 267 US 120, *referred.*

Per Dwivedi, J.

Article 368 should be read without any preconceived notions. (Para 1939)

The power to amend means the power to make an addition to or alteration in or substraction from the text. The purpose of addition, alteration or substraction may vary; it may be to make the text or some part of it more complete or perfect or effective. It also appears that the whole text of a law cannot be repealed or abrogated in one step; some part of it must remain while the other is repealed. (Para 1885)

Part IV—Article 368—Scope of amending power (*contd.*)

The power to amend includes the power to substitute one provision for another. (Para 1891)

Per Chandrachud, J.

It is hardly possible to restrict the legal meaning of amendment to 'improvement', nor can it be denied that by amendment complete articles may be removed or replaced. The word 'amendment' in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations. The power contained in Article 368 to amend the Constitution is indeed so wide that it expressly confers a power by clause (*e*) of the proviso to amend the amending power itself. (Paras 2055 and 2059)

F—Amending power of Parliament under Article 368

Nature and Object of—Whether legislative or constituent power—Whether Parliament when acting as the amending body acts as a Constituent Assembly—State Legislatures while ratifying amendments relating to the proviso in Article 368 whether exercise constituent power.

Per Sikri, C. J.

(This aspect need not be discussed.) (Para 38)

Per Shelat & Grover, JJ.

Amending power was of a diffused kind and contained in more than one provision of the Constitution. (Para 502)

The amending body under Article 368 cannot have the same powers as a Constituent Assembly. (Para 538)

Per Ray, J.

The law making power is the genus of which legislative power and constituent power are the species. The differentia is found in the different procedure prescribed for the exercise of constituent power as distinguished from that prescribed for making ordinary laws. The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void, since the Constitution is the touchstone of validity and that no provision of the Constitution can be ultra vires. (Para 782)

The distinction between the power to amend the Constitution and the ordinary power to enact laws is fundamental to all federal Constitutions. Thus an amendment of the Constitution under Article 368 is constituent law and not law within the meaning of Article 13(2) and law as defined in Article 13(3)(*a*). (Para 783)

Sankari Prasad Singh Deo v. *Union of India*, 1952 SCR 89: AIR 1951 SC 458; *Sajjan Singh* v. *State of Rajasthan*, (1965) 1 SCR 933: AIR 1965 SC 845 and *Golak Nath* v. *State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC 1643, *considered.*

A. K. Gopalan v. *State of Madras*, 1950 SCR 88: AIR 1950 SC 27, *referred.*

When amendment is affected under the proviso to Article 368 Parliament does not act as a Union legislature. (Para 784)

The exercise of the power of ratification by the State legislatures is constituent power and not ordinary law making power. (Para 789)

The object and necessity of amendments are firstly, orderly change and secondly the very object of amendment is to make changes in the fundamental law or organic law to make fundamental changes in the Constitution, to change the fundamental or the basic principles in the Constitution. Otherwise there will be no necessity to give that importance to the high amending power to avoid revolution. The machinery of amendment is like a safety

Part IV—Article 368—Scope of amending power (*contd.*)

valve. Amendment is a form of growth of the Constitution inasmuch as amendment means fundamental changes. (Paras 849, 851 and 853)

The amending power is said to be a recreation of the Constituent Assembly every time Parliament amends the Constitution in accordance with Article 368. (Para 797)

A legislature has no power to ignore the conditions of law-making imposed upon it which regulate its power to make law. (Para 815)

McCawley v. *The King*, 1920 AC 691, *considered.*

Bribery Commissioner v. *Pedric Ranasinghe*, 1965 AC 172, *explained.*

Per Palekar, J.

Amending power is sovereign constituent power. The word 'sovereign', may, for our purpose, simply stand as a description of a power which is superior to every one of the other powers granted to its instrumentalities by the Constitution. (Para 1231)

The amplitude and effectiveness of the constituent power is not impaired because it is exercised by this or that representative body or by the people in a referendum. Amplitude of amending power is wide. (Paras 1232 and 1236)

When the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the Constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. (Para 1226)

The pre-eminent object in framing a constitution is orderly government. Knowing that no constitution, however good it may seem to be when it was framed, would be able to bear the strain of unforeseen developments, the framers wisely provide for the alteration of the Constitution in the interest of orderly change. Between these two co-ordinates, namely the need for orderly government and the demands for orderly change, both in accordance with the Constitution, the makers of the Constitution provide for its amendment to the widest possible limit. (Para 1239)

Per Dwivedi, J.

The Constitution makes a distinction between 'legislative power' and 'constituent power'. 'Constituent power' determines the frame of primary organs of Government and establishes authoritative standards for their behaviour. In its ordinary sense, legislative power means power to make laws in accordance with those authoritative standards. Legislative power may determine the form of secondary organs of Government and establish subordinate standards for social behaviour. The subordinate standards are derived from the authoritative standards established by the constituent power. The amending power conferred by Article 368 is a constituent power and not a legislative power. (Paras 1876 to 1878)

The nature of the power conferred on Parliament by Article 368 is similar to the power exercisable by a Constituent Assembly. Therefore the amending power in Article 368 is as unlimited and unconfined as the power of a Constituent Assembly. Indeed, it may truly be said that Parliament acts as a Continual Constituent Assembly. (Para 1895)

While making an amendment under Article 368, Parliament acts as a constituent authority and not as a State organ. (Para 1904)

Per Chandrachud, J.

The Parliament performing its functions under Article 368 discharges those functions not as a Parliament but in a constituent capacity. The distinction between constituent power and ordinary legislative power can best be appreciated in the context of the nature of the Constitution which the court has to interpret in regard to the amending power. Thus the true ground of division, by virtue of the nature of the Constitution, is whether it is flexible or rigid. That depends upon whether the process of constitutional law-making is or is not identical with the process of ordinary law-making. (Paras 2068, 2070 and 2072)

Part IV—Article 368—Scope of amending power *(contd.)*

Exercise of amending power — Article 13(2) and Article 368 — 'Law' in Article 13(2) whether covers amendments under Article 368 — Constitutional law and ordinary law — Distinction — Criterion of differentiation — Rigid and flexible Constitution or controlled and uncontrolled Constitution — Non-existence of the distinction between 'law' and 'constitutional law' in some constitutions — Distinction made in the provisions of the Constitution of India itself — Kelson's theory of Higher Law — Constitution of India as higher law for testing the validity of other law — Harmonization of Articles 13(2) and 368 — Plea that 'law' in Article 13(1) included Constitutional Law and hence also in Article 13(2) — Validity of the plea — Effect of Articles 372(1) and 395 — Omission in definition of 'law' in Article 13(3)(*a*) to include constitutional amendments — Inference — Golak Nath view whether right — Article 13(2) if redundant — Non-mention of 'law' in Article 368 if material.

Per Sikri, C.J.

Whether 'law' in Article 13(2) includes constitutional amendments need not be discussed as the result would be the same even if it be assumed in favour of the respondents. (Para 38)

Per Shelat & Grover, JJ.

The Constitution of India is a written and controlled Constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. (Para 486)

Per Hegde & Mukherjea, JJ.

The Constitution is amended by enacting Amendment Acts. The Constitution is not only a law but the paramount law of the country. An amendment of that law must necessarily be a law. The fact that the word 'law' is not used in Article 368 is of little significance. (Para 622)

(Minority in *Sajjan Singh's case* and majority in *Golak Nath case*, *relied on*.)

Even if procedure for passing an Amendment Bill had been different to that for an ordinary Bill, there can be hardly any doubt that the amendment of a Constitution is 'law'. But the question still remains whether it was intended that 'law' in Article 13(2) should include Constitution Amending Acts. Articles 368 and 13(2) must be construed harmoniously. So of the two meanings of 'law', that meaning should be selected which harmonizes with Article 368. Hence, 'law' in Article 13(2) must be construed as referring to the exercise of an ordinary legislative power. The Constitution-makers have not used the expression 'law' in the Constitution as including constitutional law. The scope of Article 13(1) does not bear on the interpretation of the expression 'law' in Article 13(2). (Paras 623 to 626)

Per Ray, J.

An amendment of the Constitution becomes a part of the fundamental law. The legality of an amendment is no more open to attack than of the Constitution itself. The opening part of unamended Article 368 viz. "An amendment of this Constitution may be initiated" and its concluding part before the proviso viz., "The Constitution shall stand amended" show clearly that the whole Constitution can be amended and no part of the Constitution is excluded from the amendment. Herein lies the vital distinction between the Constitution and the ordinary law. (Para 771)

The distinction lies in the criterion of validity. The validity of an ordinary law can be questioned. When it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The validity of constitutional law cannot be justified by reference to another higher law. The real distinction is that Constitutional law is the source of all legal validity and is itself always valid.

Ordinary law on the other hand must derive its validity from a higher legal source, which is ultimately the Constitution. Law in Article 13(2) of the Constitution could only mean that law which needs validity from a higher source and which can and ought to be regarded as invalid when it comes in conflict with higher law. It cannot possibly include a law which is self-validating and which is never invalid. (Paras 772 and 773)

The Constitution is the higher law and it attains a form which makes possible the attribution to it of an entirely new set of validity, the validity of a statute emanating from the sovereign people. Invested with statutory form and implemented by judicial review higher law becomes juristically the most fruitful for people. There is no higher law above the Constitution. (Para 934)

In Article 368 the word "law" is not used at all. Consequently the language of Article 368 raises no question about applicability of Article 13(2). (Para 777)

The fundamental error in including amendment of the Constitution in law under Article 13(2) is by overlooking the vital difference between the constituent and the legislative powers and in wrongly equating these powers. (Para 777)

In order to show that law in Article 13(2) includes amendment of the Constitution it is also necessary to show that the expression "laws in force" in Article 13(1) includes constitution amendments or the Constitution itself. It is impossible to accept the submission that the word "law" in Article 13(2) includes the Constitution. The Constitution itself cannot include the Constitution. It is the Constitution which continues the laws in force. Therefore, law in Article 13 is law other than the Constitution and a fortiori it is other than amendment to the Constitution. (Para 780)

In a rigid or controlled Constitution the distinction between legislative power and constituent power is not only conceptual but material and vital in introducing legal consequences. In a controlled Constitution it is not correct to say that legislative power is the species. (Para 782)

If Article 368 had begun with a non obstante clause it could not have been said that amendment under Article 368 would be law within the meaning of Article 13(2). The fact that Article 368 confers constituent powers is apparent from the special conditions prescribed in the Article. These conditions are different from ordinary law-making process. (Para 819)

Mohd. Yakub case establishes that the expression "law" in Article 13(2) is not all embracing in spite of the exclusive definition of law in Article 13(3). (Para 820)

•*Ghulam Sarwar* v. *Union of India*, (1967) 2 SCR 271: AIR 1967 SC 1335, and *Mohd. Yakub* v. *State of J. & K.*, (1968) 2 SCR 227: AIR 1968 SC 765, *relied on.*

History of the formation and framing of Article 13(2) shows that the intent of the Constituent Assembly was that Article 13(2) does not control the Article relating to the amending of the Constitution. If the framers of the Constitution wanted to forbid something they would say so. The very fact that amending power is not put in any legislative power or is not attached to a subject-matter of legislative power shows that that amending power was meant to be exhaustive and plenary. Article 13(2) relates to laws under the Constitution. Laws under the Constitution are governed by Article 13(2). Article 368 relates to power and procedure of amendment of the Constitution. Upon amendment of the Constitution the Constitution shall stand amended. The Constitution is self-validating and self-executing. Article 13(2) does not override Article 368. Article 13(2) is not a fundamental right. The Constitution is the touchstone. The constituent power is sui generis. (Paras 830 to 834)

There is no distinction between Article 13(2) which expressly affirms the doctrine of ultra vires and the necessary implication of the doctrine of ultra vires which has been applied to every part of our Constitution. (Para 775)

In treating Article 13(2) as having that effect in regard to constitutional amendment

Part IV—Article 368—Scope of amending power (*contd.*)

the majority judgment in *Golak Nath case* was inept. In rejecting the distinction between legislative and constituent powers the leading majority view in *Golak Nath case* was induced by the absence of the use of the labels but the same concepts were clearly indicated by the Privy Council by wholly describing the characteristic features of legislative and constituent powers. (Para 818)

McCawley v. *The King*, 1920 AC 691 and *Bribery Commissioner* v. *Pedrick Ranasinghe* 1965 AC 172, *relied on.*

Per Jaganmohan Reddy, J.

The framers of the Constitution distinguished the 'Constitution' from 'law' or 'laws', by making evident their intention by using the word 'law' in contradistinction to the 'Constitution' indicating thereby that the word 'law' wherever referred to, means only an ordinary legislative law, while the 'Constitution' as something distinct from it. (Para 1086)

To limit the extent and ambit of the power under Article 368 in which there is no reference to a law, by including within the ambit of the definition of 'law' in Article 13(3)(*a*) for purposes of Article 13(2), an amendment effected under Article 368 is to restrict the power of amendment by a strained construction or to impute to the framers of the Constitution a lack of respect to the amending power by making the bar of Article 13(2) applicable to it by mere implication, when in respect of minor instruments they were careful enough to include them in the definition of 'law'. In reading any articles in Part III, read with Article 13(2) having the words 'law', 'in accordance with law', or 'authority of law' clearly indicate that 'law' in Article 13(2) is that which may be made by the ordinary legislative organs. (Paras 1082 and 1084)

Article 13(2) does not place an embargo on Article 368 for amending any of the rights in Part III. (Para 1094)

Article 13(2) is not a bar to constitutional amendments inasmuch as the inhibition contained therein is only against ordinary legislative actions. (Para 1097)

The assumption that 'State' would mean all the agencies of the Government jointly or separately when the agencies of the State have been separately enumerated, is not justified. The prohibition in Article 13(2) would be against each of them acting separately. (Para 1085)

Per Palekar, J.

It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a 'rigid' or 'controlled' constitution because the Constituent Assembly has "left a special direction as to how the Constitution is to be changed". What distinguishes a 'rigid' constitution from a 'flexible' constitution is that it requires a special procedure for its amendment. Rigidity of procedure in the matter of amendment is the only point of primary distinction between a 'rigid' and flexible' constitution and when this rigidity is overcome by following the special procedure, the power of amendment is not inhibited by the fact that a constitutional provision is either important or unimportant. The amending power operates on all provisions as effectively as it does in a flexible constitution. (Paras 1222 and 1243)

The character of an amendment which can be made in a constitution does not depend on the flexibility or rigidity of a constitution. (Para 1242)

All constitutions whether flexible or rigid must have the power to amend the constitution to the same degree; and if flexible constitutions have the power to make necessary changes in their most cherished constitutional principles, this power cannot be denied to a constitution merely because it is a rigid constitution. The amending power in such a constitution may, therefore, reach all provisions whether important or unimportant, essential or unessential. (Para 1244)

Part IV—Article 368—Scope of amending power (*contd.*)

Edwards v. *Lesueur*, 33 SWR 1130; *Livermore* v. *Waits*, 102 Cal 118; *Ex parte Dillon*, 262 Fed Rep 563 decided in 1920; *Dillon* v. *Gloss*, 65 Law Ed 994; *Ex parte Mrs. D. C. Kerby*, 103 Or 612; *State* v. *Cox*, 8 Ark 436; *Downs* v. *City of Birmingham*, 198 Southern Rep 211; *Schneiderman* v. *United States*, 87 Law Ed 1796; *Rhode Island* v. *Palmer*, 64 Law Ed 946; *Ullmann* v. *United States*, 100 Law Ed 511; *Whitehill* v. *Elkins*, 19 Law Ed 2d 228; and *State* v. *Fulton*, 124 NE 172, *relied on.*

An amendment of the Constitution cannot be regarded as a law as understood in the Constitution. Article 13(2) does not control the amendment of the Constitution. (Paras 1267 and 1279)

Articles 4, 169, Para 7 of the Fifth Schedule and Para 21 of the Sixth Schedule empower the Parliament to amend the provisions of the first, fourth, fifth and sixth schedules by law. A reference to all these articles will show that in all these articles the expression 'law' means a law made by the Parliament in accordance with its ordinary legislative procedure. (Para 1267)

Omission of the word 'law' in Article 368 and Article 13(3) is significant. (Para 1268)

By its very definition a body or set of bodies exercising, as indicated in the Constitution, sovereign constituent power whether in a 'flexihle' or a 'rigid' constitution is not a government organ owing supreme obligation to the Constitution. The body or bodies operate not under the Constitution but over the Constitution. They do not, therefore, while amending the Constitution, function as governmental organs and, therefore, cannot be regarded as the State for the purposes of Part III of the Constitution. (Para 1270)

An amendment of the Constitution is not a law made by the State and hence Article 13(2) would not control an amendment of the Constitution. (Para 1271)

When an amendment is made it becomes part of the Constitution, taking an equal status with the rest of the provisions of the Constitution. Voidability is predicated only with reference to a superior law and not an equal law. There is no superior law and not an equal law. There is no superior law with reference to which its voidability can be determined. An amendment of the Constitution not being liable to be avoided with reference to a superior law is not a law about which you can predicate avoidability and, hence, stands outside the operation of Article 13(2). Article 13(2) does not control the amendment of the Constitution. On that conclusion, it must follow that the majority decision in *Golak Nath's case* is not correct. (Paras 1272 and 1279)

The exercise of the amending power must correspond with the amplitude of the power unless there are express or necessarily implied limitations on the exercise of that power. (Para 1240)

Per Khanna, J.

The Constitution which can be altered or amended without any special machinery is a flexible constitution. The Constitution which requires special procedure for the alteration or amendment is a rigid constitution. The words controlled and uncontrolled have also been used for this purpose. (Para 1345)

Amendment of the Constitution is not 'law' under Article 13(2). The words in Article 368 that the Constitution shall stand amended supports this conclusion. In a generic sense, "law" would include constitutional laws, including amendment of the Constitution, but that does not seem to be the connotation of the word "law" as used in Article 13(2) of the Constitution. (Para 1370)

There is a clear distinction between statutory law made in exercise of the legislative power and constitutional law which is made in exercise of the constituent power and the distinction should not be lost sight of. A constitution is the fundamental basic law and provides the authority under which ordinary law is made. (Para 1370)

Part IV—Article 368—Scope of amending power (*contd.*)

Article 13(2) and (3) show that the Constitution has made it clear in matters which there could be some doubt as to what would constitute 'law'. If it had been the intention of the framers of the Constitution that 'law' in Article 13 would also include constitutional law including laws relating to the amendment of the Constitution, it is not explained why they did not expressly so state in clause (*a*) of Article 13(3). (Para 1370)

The Constitution itself contains indications of the distinction between Constitution and the laws framed under the Constitution, such as in Articles 56(1)(*b*), 60, 61(1), 69 and Articles 245 to 248. (Para 1370)

The fact that in case of some of the amendments made under Article 368 ratification is necessary shows that an amendment of the Constitution is not law as contemplated by Article 13(2) or Articles 245, 246 and 248. (Para 1373)

The language of Articles 372 and 13(1) shows that the word 'law' used therein did not relate to the provisions of the Constitution or provisions relating to its amendment. If the law in force contemplated by Article 372(1) must be such as was continued after January 26, 1950, it would follow that Article 372 does not relate to the constitutional law in the sense of being law relating to the constitution of a territory. The word "law" in Article 372 has reference to law made under a constitution and not to the provisions of a constitution itself. (Paras 1374 and 1376)

In order to find the true scope of Article 13(2) in the context of its possible impact on the power of amendment, we should read it not in isolation but along with Article 368. (Para 1377)

James v. *Commonwealth of Australia*, 1936 AC 578, *relied on*.

A combined reading of Article 13(2) and Article 368 clearly points to the conclusion that extinguishment or abridgement of fundamental rights contained in Part III of the Constitution is not beyond the amendatory power conferred by Article 368. The alleged conflict between Article 13(2) and Article 368 is apparent and not real because the two provisions operate in different fields and deal with different objects. (Para 1377)

Per Mathew, J.

The outstanding characteristic of a flexible constitution like the British Constitution as contrasted with a rigid one like ours is the unlimited authority of the Parliament to which it applies, to pass any law without any restriction. In a rigid constitution, there is a limitation upon the power of the legislature by something outside itself. There is a greater law than the law of the ordinary Legislature and that is the law of the Constitution which is of superior obligation unknown to a flexible constitution. It does not follow that because a constitution is written, it is therefore rigid. There can be a written constitution which is flexible. The "sole criterion of a rigid constitution is whether the constituent assembly which drew up the constitution left any special direction as to how it was to be changed". If a special procedure is prescribed by the constitution for amending it, different from the procedure for passing ordinary law, then the constitution is rigid. (Para 1569)

As Article 368 laid down a procedure different from the procedure for passing ordinary laws, our Constitution is a rigid one and the power to amend is a constituent power. The vital distinction between constitutional law and ordinary law in a rigid constitution lies in the criterion of the validity of the ordinary law. An ordinary law, when questioned, must be justified by reference to the higher law embodied in the constitution; but in the case of a constitution, its, validity is generally speaking, inherent and lies within itself. (Paras 1471 and 1572)

So an amendment to the Constitution has the same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable. (Para 1575)

Under a controlled Constitution like ours, the power to amend cannot be a legislative

Part IV—Article 368—Scope of amending power (*contd.*)

power; it can only be a constituent power. Were it otherwise, the Constitution would cease to be a controlled one. **(Para 1592)**

Therefore, by and large, the only distinction between a law amending the Constitution and an ordinary law in a rigid constitution is that an amendment of the Constitution has always to be made in the manner and form specially prescribed by the Constitution. (Para 1579)

The word 'law' in Article 13(2), in the context could only mean an ordinary law. (Para 1581)

There is a distinction between a general power to legislate and a power to legislate by special legislative procedure and the results of the exercise of the two powers are different. (Paras 1589 and 1590)

McCawley v. *The King*, 1920 AC 691 and *Bribery Commissioner* v. *Pedrick Ranasinghe*, (1964) 2 WLR 1301 : 1965 AC 172, *explained and distinguished.*

As regards Article 13(2) being redundant it may be observed that Article 13(2) was necessary for a different purpose, namely, to indicate the extent of the invasion of the fundamental right which would make the impugned law void. The word 'abridge' has a special connotation in the American constitutional jurisprudence. (Para 1601)

So Article 13(2) does not include constitutional amendment. (Para 1600)

Per Beg, J.

Article 13(2) is meant to deal with ordinary laws or the functions of the Parliament and of State Legislatures in their ordinary law-making capacities. It was not intended to extend its scope indirectly to Article 368 which deals with the amendment of the fundamental law itself of which Article 13(2) is a part. So "Law", as used in Article 13(2) of the Constitution, does not extend to the fundamental law or the Constitution. The majority of the combined judges in all the three cases have so held it. (Para 1826)

Sajjan Singh v. *State of Rajasthan*, (1965) 1 SCR 933 : AIR 1965 SC 845; *Sri Sankari Prasad Singh Deo* v. *Union of India*, 1952 SCR 89 : AIR 1951 SC 458, *relied on.*

Our Constitution itself contains in various places a distinction between the Constitution and the law. (Para 1829)

Per Dwivedi, J.

Ordinarily a constitutional amendment is not law. Significantly, there is not a whisper of the word 'law' in Article 368. A distinction between the 'constitution' and 'law' is made in the Constitution itself. (Paras 1900 and 1902)

Per Chandrachud, J.

The fundamental distinction between constitutional law and ordinary law lies in the criterion of validity. In the case of constitutional law, its validity is inherent whereas in the case of an ordinary law its validity has to be decided on the touchstone of the Constitution. (Para 2068)

The distinction between 'flexible' and 'rigid' constitutions brings into sharp focus the true distinction between legislative and constituent power. This is the distinction which, with respect, was not given its due importance by the majority in the *Golak Nath case.* In a rigid constitution, the power to make laws is the genus, of which the legislative and constituent powers and species, the differentia being the procedure for amendment. If the procedure is ordinary, the power is legislative; if it is special, the power is constituent. (Para 2073)

There is a fundamental distinction between constitutional law and ordinary law. The term 'constitutional law' is never used in the sense of including the laws made under the

Part IV—Article 368—Scope of amending power (*contd.*)

Constitution. Constitutional law is the fundamental, superior or paramount law. Its authority and sanction are higher than those of ordinary laws. (Para 2063)

The pre-Constitution and the post-Constitution laws dealt with by the two clauses of Article 13 are in nature and character identical. They are ordinary laws as distinguished from constitutional laws. Article 13(1) therefore does not include any constitutional laws. (Paras 2064 and 2065)

Fundamental Rights if can be abridged or amended—Golak Nath view if right—Nature of Part III—Fundamental Rights if sacrosanct, transcendental, inalienable—Whether in the nature of 'natural rights' or 'human rights'—Unamendability of the core or essence of the Fundamental Rights—Emphasis laid by the Preamble to the Constitution—International recognition of Fundamental Rights as Human Rights—India party to the Declaration on Human Rights—Part III and Natural law—Fundamental Rights if a gift of the Constitution.

Factors against unamendability—No explicit bar against amendment of Part III in the Constitution—Article 19 limited to citizens only—Article 33 empowering modification of the Rights for the Armed Forces—Suspension of Fundamental Rights during emergency—Non-inclusion of Part III in the proviso to Article 368—Inference from Article 368—Passing of First Amendment a practical exposition by the Constitution-makers.

Per Sikri, C. J.

The fact that Article 19 confers rights on citizens only and that Article 33 limits the fundamental rights of Armed Forces does not mean that the rights cease to be natural or human rights. It is difficult to hold that *some* rights are not natural or inalienable. Besides India was a party to the Universal Declaration of Human Rights and that Declaration describes some fundamental rights as inalienable. (Para 299)

In various decisions the Supreme Court has described the fundamental rights as 'natural rights' or 'human rights'. (Para 300)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88, 198-199 : AIR 1950 SC 27; *State of W. B.* v. *Subodh Gopal Bose*, 1954 SCR 587, 596 : AIR 1954 SC 92 ; *Ujjambai* v. *State of U. P.*, (1963) 1 SCR 778, 926-7 : AIR 1962 SC 1621 ; *State of W. B.* v. *Anwar Ali Sarkar*, 1952 SCR 284, 293 : AIR 1952 SC 75 ; *Basheshar Nath* v. *C. I. T.*, 1959 Supp 1 SCR 528, 551 : AIR 1959 SC 149 and *Satwant Singh* v. *Passport Officer*, (1967) 3 SCR 525, 542 : AIR 1967 SC 1836, *relied on*.

Motilal v. *State of U. P.*, ILR (1951) 1 All 269, 387-8 : AIR 1951 All 257, *approved*.

In view of Article 51 of the directive principles, the Supreme Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. (Para 151)

Corocraft v. *Pan American Airways*, (1969) 1 All ER 82, 87, *relied on*.

Per Shelat & Grover, JJ.

The decision in *Golak Nath case* has become academic for even on the assumption that the majority decision regarding unamendability of Part III is incorrect, the result on the question, presently raised would be the same.

Even if the amending power includes the power to amend Article 13(2), a question not decided in *Golak Nath*, the power is not so wide as to include the power to abrogate or take away the fundamental freedoms. (Paras 479 and 608)

Part IV—Article 368—Scope of amending power (*contd.*)

Per Hegde & Mukherjea, JJ.

Before a Constitution can be validly amended, two requirements must be satisfied. Firstly, there must be the power to amend the provision sought to be amended; and *secondly*, the "form and the manner" prescribed in Article 368 must be satisfied. If the power to amend the Article is wanting, the fact that Parliament has adhered to the form and manner prescribed in Article 368 becomes immaterial. Hence the primary question is whether Parliament has power to abridge or take away any of the Fundamental Rights prescribed in Part III of the Constitution. For that the true scope of Article 368 must be determined. (Paras 618 and 619)

We are unable to construe the amending power in a narrow or pedantic manner. That power, under any circumstances must receive a broad and liberal interpretation. How large it should be is a question that requires closer examination. Both on principle as well as on the language of Article 368, we are unable to accede to the contention that no right guaranteed by Part III can be abridged. (Para 634)

It is significant in this regard that *Golak Nath case* had overruled the earlier decisions and that too by slender majority. Also it should be noted that the Parliament that passed the 1st Amendment was the Constituent Assembly itself which formed Article 368 and which was continuing as a provisional Parliament. (Paras 635 and 636)

On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. (Para 666)

[**Ed.**: *See* approach of Hegde & Mukherjea, JJ. (*supra*)] (Para 612)

Per Ray, J.

If it was intended by Article 13(2) to exclude Part III altogether from the operation of Article 368, clause (*e*) would not have been enacted. The Constituent Assembly thus enacted Article 368 so that the power to amend should not be too rigid nor be too flexible. (Para 785)

Under clause (*e*) of Article 368 the Article itself can be amended. Therefore, an amendment of Article 368 providing that provisions in Part III can be amended will be constitutional.

The title of Article 368 in its ordinary sense means every part of the Constitution. This would include Article 368 itself. There is no limitation imposed upon or exception made to the amendments which can be made. It is not permissible to add to Article 368 words of limitation which are not there. (Para 785)

The fundamental rights can be amended and the Preamble does not stand in the way. (Para 888)

Kerala Education Bill, 1957, 1959 SCR 995 : AIR 1958 SC 956, *relied on.*

Basheshar Nath v. *C. I. T.*, 1959 Supp 1 SCR 528 : AIR 1959 SC 149, *referred.*

There is intrinsic evidence in the provisions of Part III itself that our Constitution does not adopt the theory that fundamental rights are natural rights or moral rights which every human being is at all times to have these rights are conferred by the people of India under the Constitution and they are such rights as the people thought fit to be in the organised society or State which they were creating. These rights did not belong to the people of India before January 26, 1950 and could not have been claimed by them. (Para 929)

Basheshar Nath v. *C. I. T.*, 1959 Supp 1 SCR 528 : AIR 1959 SC 149, *relied on.*

Foreigners are human beings but they are not given fundamental rights because these

Part IV—Article 368—Scope of amending power (*contd.*)

rights are conferred only on citizens as citizens. Article 33 shows that citizens can be denied some of these rights. If these are natural rights these cannot be abrogated. Article 34 again shows restriction on rights conferred by Part III while material law is in force in any area. Articles 352 and 358 also illustrate as to how while the proclamation of emergency is in operation provisions of Article 19 are suspended during emergency. Articles 25 and 26 by their opening words show that the right to the freedom of religion is subject to the paramount interest of society. (Paras 929 to 932)

Fundamental rights are social rights conferred by the Constitution. There is no law above the Constitution. The Constitution does not recognise any type of law as natural law. (Para 937)

The Directive Principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The Directive Principles embody the set of social principles to shape fundamental rights to grant a freer scope to the large scale welfare activities of the State. Therefore, it will be wrong to equate fundamental rights as natural, inalienable, primordial rights which are beyond the reach of the amendment of the Constitution. (Para 939)

The declaration of human rights on which the petitioner relied for the unamendability of fundamental rights is no impediment to the power of amendment nor to support the petitioner's contention regarding the inviolability of the right to property. (Para 1016)

A fundamental right may be regarded as fundamental by one generation. It may be considered to be inconvenient limitation upon legislative power by another generation. (Para 1016)

Per Jaganmohan Reddy, J.

Article 13(2) inhibits only a law made by the ordinary legislative agency and not an amendment under Article 368, that Parliament could under Article 368 amend Article 13 and also the fundamental rights, and though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity. (Para 1162)

Parliament cannot under Article 368 abrogate, damage or destroy any of the fundamental rights though it can abridge to an extent where it does not amount to abrogation, damage or destruction. (Para 1189)

Per Palekar, J.

Nor is it correct to describe the fundamental rights, including the right to property, as rights "reserved" by the people to themselves. The Constitution does not use the word "reserved". It says that the rights are "conferred" by the people upon themselves, suggesting thereby that they were a gift of the Constitution. The constitution had, therefore, a right to take them away. Freedoms are not intended only for the fortunate few. They should become a reality for those whose entire time is now consumed in finding means to keep alive. (Paras 1278 and 1279)

Most of the fundamental rights may be traced to the principles of Liberty and Equality mentioned in the Preamble. But whereas the concepts of Liberty and Equality are mentioned in absolute terms in the Preamble the fundamental rights including the several freedoms are not couched in absolute terms. The submission that the fundamental rights are an elaboration of the Preamble in an over-statement and a half-truth. (Paras 1300 and 1301)

Though the plea was generally made on behalf of all fundamental rights, the fundamental rights, with which we are concerned, principally, is the right to property. It will be sufficient to note here that in modern democracies the tendency is not to recognize right to property as an inalienable natural right. (Para 1279)

Part IV—Article 368—Scope of amending power (*contd.*)

Per Khanna, J.

The words "the Constitution shall stand amended" in Article 368 plainly cover the various articles of the Constitution, and it is difficult in the face of those clear and unambiguous words to exclude from their operation the articles relating to fundamental rights in Part III of the Constitution. (Para 1358)

What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer should be in the affirmative, as long as the basic structure of the Constitution is retained. (Para 1421)

The fact that in the Constitution as ultimately adopted, there was no provision either in Article 368 or in any other article containing a limitation on the power of amendment shows that no such limitation was intended. (Para 1361 and 1365)

The First Amendment provides clear evidence of how the provisions of Article 368 were construed and what they were intended and assumed to convey by those who framed the Constitution and how they acted upon the basis of the said intention and assumption soon after the framing of the Constitution. The contemporaneous practical exposition furnishes considerable aid in resolving the said doubt and construing the provisions of the article. (Para 1365)

William McPherson v. *Robert R. Blacker*, 146 US 1, *relied on.*

It is fallacious to talk of amendment of Part III by a Constituent Assembly formed by an Act of Parliment acting under List I, Entry 97. It is also facile to talk of a referendum. (Paras 1400 to 1404)

George S. Hawkes v. *Harvey C. Smith as Secretary of State of Ohio*, 64 L Ed 871 ; *State of Rhode Island* v. *A. Mitchell Palmer Secretary of State*, 253 SCR 350, 64 L Ed 916, *relied on.*

United States v. *Sprague*, 282 US 716, *referred to.*

The argument that even if a fundamental right be held to be amendable, the core or essence of that right should be held to be immune from the amendatory process is unacceptable. If the provisions of the Constitution are clear and unambiguous and contain no limitations on the power of amendment, the court would not be justified in grafting limitations on the power of amendment because of an apprehension that the amendment might impinge upon human rights contained in the United Nations Charter. The power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. (Paras 1464, 1467 and 1469)

By including amendment of Part III under Article 368 we would avoid chaotic consequences and would also prevent the introduction of uncertainty, friction or confusion into the working of our Constitution. (Para 1397)

The majority view in the *Golak Nath case* that Parliament did not have the power to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights cannot be accepted to be correct. Fundamental rights contained in Part III of our Constitution can be abridged or taken away in compliance with the procedure prescribed by Article 368, as long the basic structure of the Constitution remains unaffected. (Para 1508)

Right of property does not pertain to basic structure or framework of the Constitution. (Para 1537)

Per Mathew, J.

Natural rights are those rights which are appropriate to man as a rational and moral

Part IV—Article 368—Scope of amending power (*contd.*)

being and which are necessary for a good life. Although called 'rights', they are not per se enforceable in Courts unless recognized by the positive law of a State. The doctrine of the law of nature was the bulwark and the lever of the idea of the rights of man embodied in the International Bill of Human Rights with a view to make the recognition of these rights more effective and to proclaim to the world that no State should violate these rights. That all natural rights are liable to be limited or even taken away for common good is itself a principle recognized by all writers on natural law. (Paras 1672, 1679 and 1681)

When under Article 33 the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. Nor am I impressed by the argument that because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural rights. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights, suffers from the same fallacy. (Paras 1681 and 1682)

It was contended that there are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free from any limitation. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. Some of the rights like the right to life and to the pursuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are, to a certain extent, inalienable. Others like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them. They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise. They are subject to conditions and limitations dictated in each case by justice, or by considerations of the safety of the realm or the common good of the society. (Para 1683)

On protection of the core and essence of fundamental rights I am not dismayed by the suggestion that no yardstick is furnished to the Court except the trained judicial perception for finding the core or essence of a right, or the essential features of the Constitution. Most of the things in life that are worth talking about are matters of degree and the great judges are those who are most capable of discerning which of the gradations make genuine difference. Nor do I think that all the provisions in the Constitution are equally essential. (Paras 1696 and 1697)

The question whether a particular Fundamental Right should be taken away or abridged for the common good of the society must be decided in the light of the experience of each generation and not by what was said or laid down at the time of the framing of the Constitution. The First and Sixteenth Amendments illustrate that exigencies not visualized by the makers of the Constitution would arise and that Fundamental Rights will have to be abridged for the common good for securing higher values. (Paras 1688 and 1692)

I think there are rights which inhere in human beings because they are human beings—whether you call them natural rights or by some other appellation is immaterial. As the Preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution. The moral rights embodied in Part IV of the Constitution are equally an essential feature of it. (Para 1714)

Part IV—Article 368—Scope of amending power *(contd.)*

The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values. (Para 1714)

Without some property or capacity for acquiring property there can be no individual liberty, and that without some liberty there can be no proper development of character. The concept of property is not an arbitrary ideal but is founded on man's natural impulse to extend his own personality. In the long run, a man cannot exist, cannot make good his right to marriage or found a family unless he is entitled to ownership through acquisition of property. (Paras 1725 and 1727)

The decision in *Golaknath case* that the Parliament had no power to amend Fundamental Rights in such a way as to take away or abridge them was wrong. (Para 1784)

Per Beg, J.

The power of amendment must include the power to change the limitations, the fundamental rights, to suit the needs of each age and generation. (Para 1824)

Per Dwivedi, J.

It is an error to consecrate the rights enumerated in Part III of the Constitution as "sacrosanct" or "transcendental" or to romanticise them as "natural rights" or "primordial rights" or to embalm them in the shell of "inalienable and inviolable" and "immutable". (Paras 1915 and 1916)

Fundamental rights may be taken away or abridged for the good of the people. (Para 1918)

Basheshar Nath v. *C. I. T.*, 1959 Supp 1 SCR 528, 604-05: AIR 1959 SC 149, *relied on.*

Each and every provision of the Constitution including Part III falls within the sway of the amending power. No provision of the Constitution can claim immunity from the sway of the amending power. The amending power can amend each and every provision of the Constitution including the Preamble and Part III. (Paras 1879 and 1884)

Per Chandrachud, J.

It is important to mention that all the eleven judges who constituted the Bench were agreed that even Fundamental Rights could be taken away but they suggested different methods for achieving that purpose. Subba Rao, C. J., and his 4 colleagues suggesting calling of a Constituent Assembly; Hidyatullah, J., suggested an amendment of Article 368 for calling a Constituent Assembly after passing a law under Entry 97; the remaining 5 Judges held that the Parliament itself had the power to amend the Constitution so as to abridge or take away the Fundamental Rights. The observation in the leading majority judgment putting restraints on the future power of the Parliament to take away Fundamental Rights cannot constitute the ratio of the majority judgment. (Paras 2037 and 2038)

Fundamental Rights undoubtedly occupy a unique place in civilized societies, whether you call them "transcendental", "inalienable", "inviolable" or as Lieber called them "primordial". There is no magic in these words for, the strength and importance of these rights is implicit in their very description in the Constitution as "fundamental". But the special place of importance which they occupy in the scheme of the Constitution, cannot by itself justify the conclusion that they are beyond the reach of the amending power. It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man. There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers. (Paras 2076 and 2083)

There are formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. (Para 2092)

The 'natural right' theory stands, by and large, repudiated today. The notion that societies and governments find their sanction on a supposed contract between independent individuals and that such a contract is the sole source of political obligation is now regarded as untenable. Natural rights have no other than political value. (Para 2084)

An amendment of Constitution within terms of Article 368 not being law within the meaning of Article 13(2), it cannot become void on the ground that it takes away or abridges the rights conferred by Part III. (Para 2075)

G—Limitations on the Amending Power

Basic and essential features of the Constitution as limitation on the amending power—Nature, meaning and ascertainment of the basic and essential features—Vagueness involved in the whole concept—Who to determine the basic and essential features—Judiciary as the deciding body—Feasibility and wisdom of—Practical difficulties resulting from Judicial review of Constitutional amendments after promulgation and implementation of laws thereunder—Possibility of such Judicial review after some years of the passing of the Constitutional amendment.

Per Sikri, C. J.

Every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government.
(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) Federal character of the Constitution. (Para 292)

The above structure is built on the basic foundation, i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed. (Para 293)

The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution. (Para 294)

Maqbool Damnoo v. *State of J. & K.*, (1972) 1 SCC 536, 546, *explained and distinguished.*

Per Shelat and Grover, JJ.

The provisions of the Constitution mentioned in the proviso do not show that the basic structure of the Constitution can be changed if the procedure laid down therein is followed. (Para 496)

The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded

Part IV—Article 368—Scope of amending power (*contd.*)

as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

(1) The supremacy of the Constitution.
(2) Republican and Democratic form of Government and sovereignty of the country.
(3) Secular and federal character of the Constitution.
(4) Demarcation of power between the legislature, the executive and the judiciary.
(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
(6) The unity and the integrity of the nation. (Para 582)

Per Hegde & Mukherjea, JJ.

The fact that 'Fundamental Rights' have been variously described as "paramount", "sacrosanct", "rights reserved by people", "inalienable and inviolable" and "transcendental" does not mean that they alone are the basic elements or fundamental features. (Para 632)

The fundamental features are spread out in various other parts of the Constitution. They are also found in some of the Directive Principle set out in Part IV of the Constitution and in the provisions relating to the sovereignty of the country, the Republican and the Democratic character of the Constitution even the provisions relating to the unity of the country are basic elements of the Constitution. (Para 632)

The position as regards the ascertainment of the basic elements or fundamental features of the Constitution can by no means be more difficult than the difficulty of the legislatures to determine before hand the constitutionality of legislations made under various other heads. (Para 661)

Arguments based on the difficulties likely to be faced by the legislatures are of very little importance and they are essentially arguments against judicial review. (Para 661)

Are the basic and essential features of the Constitution vague?

The broad contours of the basic elements or fundamental features of our Constitution are clearly delineated in the Preamble. Unlike in most of the other Constitutions, it is comparatively easy in the case of our Constitution to discern and determine the basic elements or the fundamental features of our Constitution. For doing so, one has only to look to the Preamble. It is true that there are bound to be border line cases where there can be difference of opinion. That is so in all important legal questions. But the courts generally proceed on the presumption of constitutionality of all legislations. The presumption of the constitutional validity of a statute will also apply to constitutional amendments. It is not correct to say that what is difficult to decide does not exist at all. (Para 661)

The whole scheme and the structure of our Constitution proceeds on the basis that there are certain basic features which are expected to be permanent. (Para 654)

A Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. (Para 651)

Per Ray, J.

All provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself. (Para 901)

When the Constitution does not make may distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. (Para 906)

It is permissible under Article 368 to change from a Parliamentary system into a Presidential system. The federal structure can be changed into a confederation or by conferring greater power on the centre. (Para 911)

An amendment of the Constitution is to make fundamental changes in the Constitution. Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of Government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system. (Para 917)

The power of amendment is unlimited so long as the result is an amended Constitution, that is to say, an organic instrument which provides for the making interpretation and implementation of law. (Para 917-A)

The theory of unamendability of so called essential features is unmeritorious in the face of express provisions in Article 368 particularly in clauses (*a*) to (*d*) of the proviso. (Para 918)

Per Jaganmohan Reddy, J.

The elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. (Para 1159)

The fact that a complete list of these essential elements constituting the basic structure are not enumerated, is no grounds for denying that these exist. (Para 1159)

If Parts III and IV or either of them are totally abrogated, it cannot be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the Preamble remains the same. (Para 1159)

When clause (4) of Article 32 does not even permit suspension of the right under Article 32 except as otherwise provided in the Constitution, that is, by Article 359, it is highly unthinkable that by an amendment this right could be abrogated. This pivotal feature of the Fundamental Rights demonstrates that this basic structure cannot be damaged or destroyed. When a remedy cannot be abrogated, it should follow that the fundamental rights cannot be abrogated for the reason that the existence of a remedy would be meaningless without the rights. (Para 1161)

Per Palekar, J.

All provisions in a constitution must be conceded the same character and it is not possible to say that one is more important and the other less important. When a legislature has the the necessary power to amend, it can amend an important constitutional provision as unceremoniously as it can amend an unimportant provision of the Constitution. (Paras 1242 and 1243)

The argument that essential features (by which counsel for the petitioner means "essential features, basic elements of fundamental principles") of the Constitution, though capable of amendment to a limited extent are not liable to be damaged or destroyed is only a variation on the argument previously urged before this court on the basis of the so-called "spirit of the constitution" which had been rejected as far back as 1952. (Para 1309)

State of Bihar v. *Kameshwar Singh*, **1952 SCR 889**, *relied on*.

Part IV—Article 368—Scope of amending power (*contd.*)

As regard the argument of essential features, two difficulties arise. Who is to decide what are essential provisions and non-essential provisions? If the court is to decide them. Secondly, if an essential provision is amended and a new provision is inserted, which, in the opinion of the constituent body, should be presumed to be more essential than the one repealed, what is the yardstick the court is expected to employ? (Para 1311)

Apart from the difficulty in determining where the 'core' of an 'essential feature' lies, it does not appear to be sufficiently realized what fantastic results may follow in working the Constitution. (Para 1311)

Every amendment, however innocuous it may seem when it is made is liable to be struck down several years after the amendment although all the people have arranged their affairs on the strength of the amended constitution. And in dealing with the challenge to a particular amendment and searching for the core of the essential feature the court will have to do it either with reference to the original constitution or the constitution as it stood with all its amendments up-to-date. (Para 1311)

Prospective overruling will be the order of the day. (Para 1311)

If the doctrine of unamendability of the core of essential features is accepted, it will mean that we add some such proviso below Article 368. (Para 1316)

Per Beg, J.

One cannot infer from anything in the language of the unamended Article 368 any ditinction between more and less basic parts of the Constitution. None are sacrosanct and transcendental, in the sense that they are immune from and outside the processes of amendment. (Para 1821)

Preamble as a limitation on the amending power.

Per Sikri, C. J.

The holding that Preamble is not a source of power cannot be extended as regards prohibitions and limitations. In fact limitations have been derived in ceratin cases. (Paras 94-98)

Per Shelat & Grover, JJ.

No one has suggested—it would be almost unthinkable for any one to suggest—that the Parliament acting under Article 368 will ever change the constitution in such a way that it ceases to be a Sovereign Democratic Republic. (Para 520)

Per Ray, J.

That the Preamble can impose serious limitations on the essential attribute of sovereignty has been rejected. (Para 884)

Where the people express themselves in careful and measured terms in framing the Constitution and they leave as little as possible to implications, amendments or changes in the existing order or conditions cannot be left to inserting implications by reference to the Preamble which is an expression of the intention at the time of the framing of the Constitution. Therefore, the power to amend the Constitution is not restricted and controlled by the Preamble. (Para 896)

Per Palekar, J.

As a matter of construction no implied limitations can be inferred from the Preamble or the fundamental rights which, being as much part of a legal document as any other provision of the constitution, are subject to equal consideration in the matter of legal construction. To be relevant, the scheme and context must say or reasonably suggest something with regard to Amending power. (Para 1299)

Part IV—Article 368—Scope of amending power (*contd.*)

The Preamble, it is now well settled can neither increase or decrease the power granted in plain and clear words in the enacting parts of a statute. (Para 1306)

In re Berubari Union and Exchange of Enclaves, 1960 SCR 250: AIR 1960 SC 845 and *Secretary of State* v. *Maharajah of Bobbili,* 43 Mad 529 PC at 536: AIR 1919 PC 52: 46 IA 302, *relied on.*

Per Khanna, J.

As Preamble is a part of the Constitution, its provisions other than those relating to basic structure or framework, it may well be argued, are as much subject to the amendatory process contained in Article 368 as other parts of the Constitution. Further, if Preamble itself is amendable, its provisions other than those relating to basic structure cannot impose any implied limitations on the power of amendment. The argument that Preamble creates implied limitations on the power of amendment cannot be accepted unless it is shown that the Parliament in compliance with the provisions of Article 368 is debarred from amending the Preamble insofar as it relates to matters other than basic structure and removing the supposed limitations which are said to be created by the Preamble. (Para 1473)

Att. Gen. v. *H. R. H. Prince Ernest Augustus of Hanover,* 1957 AC 436; *In Re The Berubari Union and Exchange of Enclaves,* (1960) 3 SCR 250: AIR 1960 SC 845, *relied on.*

Per Mathew, J.

A Preamble cannot confer any power per se or enlarge the limit of any power expressly given nor can it be the source of implied power. (Para 1620)

Berubari case, (1960) 3 SCR 350: AIR 1960 SC 845, directly negatived any limitation of what is generally regarded as a necessary and essential attribute of sovereignty on the basis of the objectives enshrined in the Preamble. (Para 1619)

Per Dwivedi, J.

Implied limitations cannot be spelt out of the vague emotive generalities of the Preamble. (Para 1936)

Preamble is neither the source of powers nor of limitations on power. (Para 1926)

Implied and inherent limitations on the power to amend the Constitution—Necessary implications in a written federal Constitution—Context and scheme of the provisions—Natural Law as a source of implied limitations—Vagueness involved in the concept of—Inherent limitations in the amending power—Spirit of the Constitution—Parliament as a body constituted by the Constitution and hence subject to inherent limitations—Non-participation by the People of India directly in the amending process if a reason for limitation.

Per Sikri, C. J.

In a written constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution. (Para 210)

In several Indian and foreign cases Legislatures have been held to have ancillary and subsidiary power which does not strictly fall within the legislative entry.

Orient Paper Mills v. *State of Orissa,* (1962) 1 SCR 549: AIR 1961 SC 1438; *Burmah Construction Co.* v. *State of Orissa,* 1962 Supp 1 SCR 242: AIR 1962 SC 1320; *Navnit Lal Javeri* v. *Appellate Assistant Commissioner,* AIR 1965 SC 1375: (1965) 1 SCR 909; *Ram Jawaya Kapur* v. *State of Punjab,* (1955) 2 SCR 225, 236-37: AIR 1955 SC 549; *Sanjeevi Naidu* v. *State of Madras,* (1970) 1 SCC 443 and *U. N. R. Rao* v. *Smt. Indira Gandhi,* (1971) 2 SCC 63, *relied on.*

Implied limitations too have been read into provisions by considering the context and scheme of the provisions.

Part IV—Article 368—Scope of amending power (*contd.*)

In re C. P. and Berar Act, 1939 FCR 18, 42: AIR 1939 FC 1; *Chiranjit Lal Chowdhuri* v. *Union of India*, 1950 SCR 869,902: AIR 1951 SC 41; *State of Bihar* v. *Maharajdhiraj of Darbhanga*, 1952 SCR 889, 934: AIR 1952 SC 252 and *In re Delhi Laws Act*, 1951 SCR 747, 984-5: AIR 1951 SC 332, *relied on.*

Raj Narain Singh v. *Patna Administration*, (1955) 1 SCR 290: AIR 1954 SC 569; *Hari Shankar Bagla* v. *State of M. P.*, (1955) 1 SCR 380: AIR 1954 SC 465; *Vasanti Lal Sanjanwala* v. *State of Bombay*, (1961) 1 SCR 341: AIR 1961 SC 4; *Municipal Corporation of Delhi* v. *Birla Cotton Mills*, (1968) 3 SCR 251: AIR 1968 SC 1232; *D. S. Grewal* v. *State of Punjab*, 1959 Supp 1 SCR 792: AIR 1959 SC 512; *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109, 112: AIR 1967 SC 944 and *West* v. *Commissioner of Taxation*, 56 CLR 657, 681-2, *referred.*

South Australia v. *Commonwealth*, 65 CLR 373, 447; *Melbourne Corpn.* v. *Commonwealth*, 74 CLR 31, 70, 81-2 and *Victoria* v. *Commonwealth*, (1971) 45 ALRJ 251-253, *relied on.*

Melbourne Corpn. v. *Commonwealth*, (1947) 74 CLR 31, *considered.*

Taylor v. *A. G. of Queensland*, 23 CLR 457; *Clayton* v. *Heffron*, (1660) 105 CLR 251; *A. G. of Canada and Lord Nelson Hotel Company Limited*, 1951 SCR Canada 31; *In re, Gray*, (1918) 57 Can SCR 150; *The Chemical Reference*, 1943 SCR 1—Canada; *In re The Initiative and Referendum Act*, 1919 AC 935; *Hodge* v. *The Queen*, (1883) 9 App Cas 117; *In re Gray*, 57 Can SCR 150 and *Shannon* v. *Lower Mainland Dairy Products Board*, 1933 AC 708, *referred to.*

Liyange's Case, 1967 AC 259 and *McCullock* v. *Maryland*, 4 L Ed 579, 607, *relied on.*

McCawley v. *The King*, 1920 AC 691, *explained.*

Attorney-General for New South Wales v. *Trethowan*, 1932 AC 527, *distinguished.*

It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state. (Para 283)

So a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning. (Para 284)

Limitations can be implied in an amending power. (Para 444)

In re, Initiative and Referendum Act, 1919 AC 935, *relied on.*

Under the Ceylon Constitution implied limitations on the power to amend the Constitution have been inferred by no less a body than the Judicial Committee of the Privy Council. (Para 204)

Bribery Commissioner v. *Pedrick Ranasinghe*, 1965 AC 172, *relied on.*

McCawley v. *The King*, 1920 AC 691, *referred.*

In *A. G. for Canada* v. *A. G. for Ontario*, the Supreme Court of Canada implied a limitation on the power of Parliament and the Legislatures of the Provinces to delegate legislative power to the other although there was no express limitation in terms, in Sections 91 and 92 of the Canadian Constitution. (Para 244)

In Canada some of the Judges have implied that freedom of speech and freedom of the Press cannot be abrogated by Parliament or Provincial Legislatures from the words in the Preamble to the Canadian Constitution, i. e. "with a Constitution similar in principle to that of the United Kingdom". (Para 245)

Part IV—Article 368—Scope of amending power (*contd.*)

Switzmen v. *Elbling*, 1957 Can SCR 285, 328; *Rex* v. *Hess*, (1949) 4 DLR 199, 208; *Re Alberta Legislation*, (1938) 2 DLR 81 and *Samur* v. *City of Quebec*, (1953) 4 DLR 641, 671, *relied upon.*

Per Shelat & Grover, JJ.

Several cases have been decided by the Supreme Court in the past where limitations have been spelt out of Constitutional provisions. (Para 547)

Chiranjit Lal Chowdhuri v. *Union of India*, 1950 SCR 869 at p. 902: AIR 1951 SC 41; *State of Bihar* v. *Kameshwar Singh*, 1952 SCR 889 at p. 934: AIR 1952 SC 252 and *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109: AIR 1967 SC 944, *relied on.*

Golak Nath v. *State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC 1643, *explained.*

There are other decisions which have laid down that there is an implied limitation on legislative power. (Para 547)

In re Delhi Laws Act, 1912, 1951 SCR 747 at pp. 984-985: AIR 1951 SC 332; *Raj Narain Singh* v. *Patna Administration*, (1955) 1 SCR 290: AIR 1954 SC 569; *Hari Shankar Bagla* v. *State of M. P.*, (1955) 1 SCR 380: AIR 1954 SC 465; *Vasantlal Sanjanwala* v. *State of Bombay*, (1961) 1 SCR 341: AIR 1961 SC 4; *Municipal Corporation of Delhi* v. *Birla Cotton Mills*, (1968) 3 SCR 251: AIR 1968 SC 1232; *D. S. Grewal* v. *State of Punjab*, 1959 Supp 1 SCR 792: AIR 1959 SC 512; *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*, (1970) 1 SCR 388 at pp. 392-393: (1969) 2 SCC 283, 286-287; *Municipal Corporation of the City of Ahmedabad* v. *New Shorock Spg. & Wvg. Co. Ltd., etc.*, (1971) 1 SCR 288 at pp. 294-297: (1970) 2 SCC 280, 285, 287 and *Ram Jawaya Kapur* v. *State of Punjab*, (1955) 2 SCR 225: AIR 1955 SC 549, *relied on.*

In fact it is only by necessary implication from the language of Article 368 (before the 24th Amendment) that the source of the amending power can be said to reside in that article. There were no such words in express or affirmative terms which conferred such a power. (Para 552)

The Privy Council has recognised a restriction on the legislative powers of a sovereign Legislature even though that is confined only to the form and manner laid down in a Constitution for amending the Constitution Act. In a country which still sticks to the theory of Parliamentary sovereignty, limitations of any other nature would be regarded as some what non-conformist and unorthodox.

There are necessary implications in a federal constitution such as, for example, that any law violating any provision of the Constitution is void even in the absence of an express declaration to that effect. (Para 570)

Queen v. *Burah*, (1878) 3 AC 889 at pp. 904-5; *In re The Initiative and Referendum Act*, 1919 AC 935; *McCawley* v. *The King*, 1920 AC 691; *A. G. for New South Wales* v. *Treathowan*, 1932 AC 526 and *Don John Francis Douglas Liyange* v. *The Queen*, (1967) 1 AC 259, *relied on.*

Bribery Commissioner v. *Pedrick Ranasinghe*, 1965 AC 172, *explained* and *relied on.*

Mohamed Samsudden Kariapper v. *S. S. Wijesinha*, 1968 AC 717, *explained.*

Amalgamated Society of Engineers v. *Adelaide Steamship Co. Ltd.*, (1920) 28 CLR 129; *A. G. of New South Wales* v. *Brewery Employees Union*, (1908) 6 CLR 469 at pp. 611-12; *Australian Railways Union* v. *Victorian Rly. Commr.*, (1930) 44 CLR 319, 390; *West* v. *Commissioner of Taxation*, (1937) 56 CLR 657, 682; *Ex parte Professional Engineers Association*, (1959) 107 CLR 208, 239; *Melbourne Corporation* v. *Commonwealth*, (1947) 74 CLR 31 and *Victoria* v. *The Commonwealth*, (1971) 45 ALJ 251, *considered.*

A. G. of Nova Scotia v. *The A. G. of Canada*, 1951 Can LR 31; *John Switzman* v. *Freda Elbling*, 1957 Can LR (SC) 285 at p. 327 and *Alberta Statutes case*, 1938 SCR (Canada) 100 at pp. 132-133, *relied on.*

Part IV—Article 368—Scope of amending power (*contd.*)

Jermaih Ryan v. *Captain Michael Lenons,* 1935 Irish Reports 170; *The State* v. *The Minister for Justice, etc.,* 1967 Irish Reports 106; *Margaret Buckley* v. *A. G. of Eire,* 1950 Irish Reports 67; *Ryan's case,* 1935 Irish Reports 170 and *Moore* v. *A. G. of Irish Free State,* 1935 AC 484, *considered.*

Edmund Burke v. *Lenon,* 1940 Irish Reports 136 and *Margaret Buckley* v. *A. G. of Eire,* 1950 Irish Reports 67, *referred.*

United States of America v. *William H. Sprague,* 75 L Ed 640, *distinguished.*

State of Rhode Island v. *A. Mitchell Palmer,* 64 L Ed 946, *referred.*

The correct approach to the question of limitations which may be implied in any legislative provisions including a constitutional document has to be made from the point of view of interpretation. It is not a novel theory or a doctrine which has to be treated as an innovation of those who evolve heterodox methods to substantiate their own thesis.

Implied limitations can only arise where there are no express limitations. Implications can be read in an amending power in a Constitution. (Para 579)

West v. *Commissioner of Taxation* (*N. S. W.*), (1936-37) 56 CLR 657, *relied on.*

Per Hegde & Mukherjea, JJ.

In cases that came up for consideration before this Court in the past, several judges did consider the possibility of having some limitation on the amending power under Article 368 though they did not definitely pronounce on that question. (Para 643)

Implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by considerations arising out of what appears to be the general scheme of the statute. (Para 655)

Re The Central Provinces and Berar (*Central Provinces and Berar Act No. XIV of 1938,* 1939 FCR 18: AIR 1939 FC 1; *James* v. *Commonwealth of Australia,* 1936 AC 578 at 603, *relied on.*

Several of the powers conferred under our Constitution have been held to be subject to implied limitations though those powers are expressed in general terms or even in absolute terms. In this respect there is no distinction between other powers and the amending power under the Constitution. The amending power under Article 368 is subject to implied limitations. (Paras 657 and 658)

The Bribery Commissioner v. *Ranasinghe,* 1965 AC 172, *relied on.*

R. v. *Burah,* 1878 IA 178, *distinguished.*

The Supreme Court of the United States has not specifically pronounced on the question of implied limitations. (Para 658)

Rhode Island v. *Palmer,* 64 L Edn 946, *explained and distinguished.*

We agree with the Chief Justice on the reading of foreign cases on "implied limitations" on amending power. (Para 662)

Per Ray, J.

Inherent and implied limitations cannot originate in an oracle when the Constitution does not contain any express prohibition against amending any provision. (Para 910)

Where a constitutional provision is comprehensive in scope and leaves no room for interpretation the Court is without power to amend, add to or detract from a constitutional provision or to create exceptions thereof by implication. The theory of implied and inherent limitations can be best described as a subtle attempt to annihilate the affirmative power of amendment. (Paras 896 and 897)

R. v. *Burah*, 3 AC 889; *Webb* v. *Outrim*, 1907 AC 89; *Fielding* v. *Thomas*, 1896 AC 600 and *Whiteman* v. *Sadler*, 1910 AC 514, *relied on.*

Implication can only be read to empower the authority to do that which is necessary in order to accomplish the ultimate object. The theory of implied and inherent limitations cannot be allowed to act as a *boa constrictor* to the clear and unambiguous power of amendment. If there is no express prohibition against amendment in Article 368 the omission of any such restriction did not intend to impose any restriction. (Paras 901 and 902)

In our Constitution Article 368 restricts only the procedure or the manner and form required for amendment but not the kind or the character of the amendment that may be made. There are no implied limitations to the amending power. (Para 854)

The above proposition is supported by American decisions.
Just as there are no implied limitation in flexible Constitutions similarly there are no implied limitations in a rigid Constitution. The difference is only in the method of amendment. (Para 859)

Lochner v. *New York*, 198 US 45; *Livermore* v. *Waite*, 102 Cal 118; *Edwards* v. *Leaseur*, South Western Report, Vol. 33, p. 1130; *Ex parte Dillon*, 262 Fed Rep 563; *Feignzspan* v. *Bodine* 264 Fed Rep 186; *Hawke* v. *Smith* 253 US 221; *Dillon* v. *Gloss*, 256 US 358; *Leser* v. *Carnett*, 258 US 130; *Ex parte Mrs. D. C. Kerby*, American Law Reports Annotated, Vol. 36, p. 1451; *Rhode Island* v. *Palmer*, 253 US 350; *U. S.* v. *Sprague*, 282 US 716; *Schneiderman* v. *United States*, 320 US 118; and *Whitehall* v. *Elkins*, 389 US 54, *relied on.*

The petitioner's theory of implied and inherent limitations is a repudiation of democratic process. (Para 953)

None of the Canadian decisions relates to amendment of the Constitution. None of these decisions indicates that there is any inherent limitation on the amendment of the Constitution. The Preamble to the B. N. Act shows that the Canadian Constitution enjoined observance of fundamental principles in British constitutional practice. The growth of the Canadian Constitution was through such usage and convention. (Para 981)

Initiative and Referendum, 1919 AC 935; *Switzman* v. *Elbling*, 1957 Canada LR 285; *Rex* v. *Hess*, (1949) 4 Dom LR 199; *Saumur* v. *City of Quebec and A. G. of Quebec*, (1953) 4 DLR 641; *Chabot* v. *School Commissioners of Lamorandiere and A. G. for Quebec*, (1958) 12 DLR 796, *explained.*

None of the Australian cases support the petitioner's plea. (Paras 984 to 995)

Taylor v. *Attorney-General of Queensland*, 23 CLR 457; *Victoria* v. *Commonwealth*, 45 Australian LJ 251, *explained.*

Amalgamated Society of Engineers v. *Adelaide Steamship Co. Ltd.*, (1920) 28 CLR 129, *relied on.*

The Irish case relied by the petitioner do not support his case. (Paras 996 to 1000)

Ryan case, 1935 Irish Reports 170; and *Morre* v. *A. G. for Irish Free State*, 1935 AC 484, *explained.*

Privy Council decisions in *Liyanage* v. *Queen*, (1967) 1 AC 259 and *Kariappar case*, 1968 AC 717 arising from Ceylon are authorities for two propositions. First, that in the exercise of the power of amendment a controlled Constitution can be coverted into an uncontrolled one. Second, the word "amendment" means alteration. (Para 1007)

Similarly *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109: AIR 1967 SC 944 does not support the petitioner.

Part IV—Article 368—Scope of amending power (*contd.*)

Per Jaganmohan Reddy, J.

An implied limitation is read into Article 368 by reason of the proviso entrenching Article 54. (Para 1140)

Though there are naturally some limitations to be found in every organic instrument, as there are hound to be limitations in any institution or any other set up brought into existence by human agencies, and though my Lord the Chief Justice has gone into this aspect fully, it is in my view not necessary to consider in this case the question of the existence or non-existence of implied or inherent limitations, because if the amending power is wide and plenary, those limitations can be overridden as indeed the *non obstante* clause in the amended clause (1) of Article 368 was intended to subserve that end. (Para 1141)

Per Palekar, J.

To introduce implied prohibitions to cut down a clear affirmative grant in a constitution would be contrary to the settled rules of construction. (Para 1288)

So far as the wording of Article 368 itself is concerned, there is nothing in it which limits the power of amendment expressly or by necessary implication. Admittedly it is a large power. Whether one likes it or not, it is not the function of the court to invent limitations where there are none. Consequences of wreckless use of the power are political in character with which we are not concerned. (Para 1263)

The argument of implied limitations in effect invites us to assess the merits and demerits of the several provisions of the constitution as a whole in the light of social, political and economic concepts embodied therein and determine on such an assessment what is the irreducible minimum of the several features of the constitution. We are invited to resort to the substantive due process doctrine of the Supreme Court of America in the interpretation of a Constitutional Amendments. That doctrine was rejected long ago. The constitution supplied the guides for the assessment of any statute made under it. It does not supply any guides to its own amendment which is entirely a matter of policy. (Paras 1312 and 1313)

From the conclusion that the power of Amendment remains unqualified by whomsoever it is exercised, it follows that there can be no implied or inherent limitations on the Amending power. Where the people have withdrawn completely from the process of Amendment, the Constituent body to whom the power is entrusted can exercise the power to the same extent as a Constituent Assembly and that the power does not vary according to the Agency to whom the power is entrusted. Therefore, this reason also viz. that Parliament is a constituted body and, therefore, it suffers from inherent limitations does not hold good. (Paras 1291 and 1292)

Per Khanna, J.

There is no warrant for the proposition that as the amendments under Article 368 are brought about by the prescribed majority of the two Houses of Parliament and in certain cases are ratified by the State Legislatures and the amendments are not brought about through referendum or passed in a Convention, the power of amendment under Article 368 is on that account subject to limitations. (Para 1415)

If there is any limitation on power of amendment, it must be found in Article 368 itself which is the sole fountain-head of power to amend, and not in other provisions dealing with ordinary legislation. (Para 1378)

It is not possible to discern in the language of Article 368 or other relevant articles any implied limitation on the power to make amendment contained in the said article. (Para 1446)

As the concept of implied limitations on the power of amendment under some higher values is not based upon some express provision of the Constitution, it must be regarded as essentially nebulous. The concept has no definite contours and its acceptance would necessarily introduce elements of uncertainty and vagueness in a matter of so vital an importance as that pertaining to the amendment of the Constitution. Whatever might be the justification for invoking the concept of implied limitations in a short constitution, so far as the Constitution of India with all its detailed provisions is concerned, there is hardly any scope or justification for invoking the above concept. What was intended by the framers of the Constitution was put in express words and, in the absence of any words which may expressly or by necessary implication point to the existence of limitations on the power of amendment, it is, not permissible to read such limitations in Constitution and place them on the power of amendment. (Para 1448)

The binding force of constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the constitution and the statute, and have to be granted by the constitutional or statutory provisions and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the constitution or the statute, can be abridged or taken away by amendment of the constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the State, and not subject to the amendatory process. In case the view is now accepted that there are implied limitations on the power of making amendment, the effect would necessarily be to introduce an element of vagueness and indefiniteness in our Constitution which our Constitution-makers were so keen to avoid. (Paras 1456 and 1466)

The different views which have been expressed in Canada are in the context of the preamble and sections of the British North America Act, the provisions of which are materially different from our Constitution. (Para 1495)

Alberta Press case, 1938 SCR 100 (Canada); *Switzman* v. *Elbing and Attorney-General of Quebec*, 1957 SCR 285 (Canada), *explained*.

The Attorney-General of Nova Scotia and the Attorney-General of Canada, 1950 SCR 31 (Canada); *distinguished*.

Cases from Ceylon explained and distinguished.

Liyanage v. *The Queen*, 1966 All ER 650; *The Bribery Commissioner* v. *Pedrick Ranasinghe*, 1965 AC 172. (Paras 1499 to 1504)

Cases from Australia explained and distinguished.

McCawley v. *The King*, 1920 AC 691; *Attorney-General for New South Wales* v. *Trethowan*, 1932 AC 520; *The State of Victoria* v. *The Commonwealth*, 45 Australian LJ Rep 257. (Paras 1505 to 1507)

Per Mathew, J.

I think there is no foundation for the theory of implied limitations. (Para 1699)

I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit the power of amendment of the future generation by exercising its power to amend the amending power. (Para 1563)

To say that a nation can still exercise unlimited constituent power after having framed a constitution vesting plenary power of amendment under it in a separate body, is only to say that the people have the political power to change the existing order by means of a revolution. But this doctrine cannot be advanced to place implied limitations upon the amending power provided in a written constitution. (Para 1614)

Implied limitations have not been countenanced in U. S. A. (Paras 1624 to 1632)

Part IV—Article 368—Scope of amending power (*contd.*)

Laser v. *Garnett*, 253 US 130; *U. S.* v. *Sprague*, 252 US 716, 733; *National Prohibition cases* (*Rhode Island* v. *Palmer*), 253 US 350; *Schneiderman* v. *U. S.*, 320 US 118, 137-145; *U. S.* v. *Dennis*, 183 Fed Rep 2 d 201; *Whitehill* v. *Elkins*, (1967) 389 US 54 and 57, *referred.*

The plea of implied limitations on the amending power is not supported by the case law relied on by the petitioner.

Ryan's case, 1935 Irish Rep 170; *Moore* v. *Attorney-General for the Irish State*, 1935 AC 484; *Liyanage* v. *The Queen*, (1967) 1 AC 259; *Web* v. *Outrim*, 1907 AC 81 (PC); *Alberta Press case*, (1938) 2 DLR 81; *Padlock Law case See Switzman* v. *Elbling*, (1957) 7 DLR 337; *Saumur* v. *City Quebec*, (1953) 4 DLR 641; *A. G. Ontario* v. *A. G., Canada*, 1912 AC 571; *In re the Initiative and Referendum Act*, 1919 AC 935 and 945; *Taylor* v. *Attorney-General of Queensland*, 23 CLR 457; *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109: AIR 1967 SC 944; *Victoria* v. *Commonwealth*, 45 Australian LJ 251; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, (1920) 28 CLR 129; *explained and distinguished.*

McCulloch v. *Maryland*, (1819) 4 Wheaten 316; *Essendon Corporation* v. *Criterion Theatres*, (1947) 74 CLR 19, 22; *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241: (1964) 1 SCR 371, *referred.*

Per Beg, J.

For the reasons already given at length by my brethren Ray, Palekar, Mathew, and Dwivedi, with whom I concur, I find that there is nothing in cases cited which could enable us to put in implied limitations, in a Constitution such as ours on Article 368, containing expressly the sovereign law-making power of amendment of every part of it. The cases have really little bearing on the interpretation of such a provision containing the constituent power. (Para 1837)

Per Dwivedi, J.

The contention that constituent power is subject to inherent and implied limitations is based on fallacious premises. (Para 1924)

It is not permissible to enlarge constructively the limitations on the amending power. Courts are not free to declare an amendment void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words. (Para 1932)

A. K. Gopalan v. *Union of India*, (1950) SCR 88 at p. 120 per Kania, C. J. and p. 220 per Mahajan, J.: AIR 1950 SC 27; *Raja Suriya Pal Singh* v. *State of U. P.*, (1952) SCR 1056 at p. 1068 per Mahajan, J.: AIR 1952 SC 252, 306; *Babu Lal Parate* v. *State of Bombay*, (1960) 1 SCR 605: AIR 1960 SC 51 and *South India Corporation* (*P*) *Ltd.* v. *Secretary, Board of Revenue, Trivandrum*, (1964) 4 SCR 280 at p. 295: AIR 1964 SC 207, *relied on.*

Mangal Singh v. *Union of India*, (1967) 2 SCR 109: AIR 1967 SC 944, *distinguished.*

Natural law cannot be invoked as a conditioning on Article 368 because it has meant differently to different jurists. (Paras 1940-41)

The absence of any express limitation makes me think that they did not surround the amending power with the amorphic penumbra of any inherent and implied limitations. (Para 1939)

Per Chandrachud, J.

The importance of the circumstance that the language of Article 368 admits of no doubt or ambiguity is that such a language leaves no scope for implications, unless in the context of the entire instrument in which it occurs, such implications become compulsive. Context also means the context of the times in which a fundamental instrument falls to be construed. (Para 2088)

Queen v. *Burah*, 5 IA 178, 195; *State of Bombay* v. *Narotham Das Jetha Bai*, (1951) 2 SCR 51, 81: AIR 1951 SC 69: 1951 SCJ 103; *Sardar Inder Singh* v. *State of Rajasthan*, 1957 SCR

Part IV—Article 368—Scope of amending power (*contd.*)

605, 616-17: AIR 1957 SC 510: 1957 SCJ 376; *Gopalan's case*, 1950 SCR 88, 121: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383; *Keshav Madhav Menon's case*, 1951 SCR 228, 231: AIR 1951 SC 128: 1951 SCJ 182: (1951) Cri LJ 860 and *Vacher & Sons Limited* v. *London Society of Compositors*, 1913 AC 107 at 112, 117, 121, *relied on.*

A large number of cases bearing on inherent or implied limitations were cited to us from U. S. A., Canada, Australia, South Africa and Ceylon. Having considered those cases carefully, it is difficult to say that the theory of implied or inherent limitations has received a wide recognition. (Para 2095-A)

Possibility of abuse of amending power.

Per Hegde & Mukherjea, JJ.

If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power granted then the Court has to take into consideration the consequences that might ensue by interpreting the same as an unlimited power. (Para 650)

Per Ray, J.

Great and wide powers are conferred for the governance of great sovereign countries and such powers cannot be withheld on the ground that they may be used externally or oppressively. (Para 899)

Per Palekar, J.

Regarding the argument of abuse of power, there is no power which cannot be abused. All Constitutions grant power to legislatures to make laws on a variety of subjects and the mere possibility of the power being used unwisely, injuriously or even abused is not a valid ground to deny legislative power. See *Bank of Toronto* v. *Lambe*, [(1387) 12 AC 575 at pp. 586-587]. If that is the position with regard to legislative power, there does not appear to be any good reason why the possibility of abuse of it by the legislature should inhibit an amendment of the Constitution which gives the power. (Para 1319)

The possibility of abuse of a power given by an amendment of the Constitution is not determinative of the validity of the amendment. (Para 1319)

Per Khanna, J.

The possibility of abuse of power is no ground for the denial of power if it is found to have been legally vested. The argument of the petitioner is one of fear and distrust in the majority of representatives of the people. (Para 1417)

Providence Bank v. *Alpheus Billings*, 29 US 514; *Ex parte John L. Rapier*, 15 US 93: 26 Law Ed 110; *Bank of Tornoto* v. *Lambe*, 12 AC 575 and *Missouri Kansas & Texas Ry.* v. *May*, 194 US 267 (on p. 270), *referred to.*

The best safeguard against the abuse or extravagant use of power is public opinion and not a fetter on the right of people's representatives to change the Constitution by following the procedure laid down in the constitution itself. (Para 1418)

Per Mathew, J.

If there is power, the fact that it may be abused is no ground for cutting down its width. (Para 1662)

Per Beg, J.

Checks on possible abuses of powers do not lie through action in Courts of law. The pressure of public opinion, and the fear of revolt due to misuse of powers of amendment are the only practically possible checks which can operate if and when such contingencies arise.

Part IV—Article 368—Scope of amending power (*contd.*)

These checks lie only in the political fields of operation. They are not subject to judicial review or control. (Para 1847)

Per Dwivedi, J.

An apprehended abuse of power would not be a legitimate reason for denying unrestricted amending power to Parliament, if the language of Article 368 so permits without stretch or strain. While construing the Constitution, it should be presumed that power will not be abused. The argument of fear is not a valid argument. (Para 1949)

Per Chandrachud, J.

There is no warrant for the assumption that the Parliament will be disposed to put a perverse construction on the powers plainly conferred on it by the Constitution. Trust in the elected representatives is the cornerstone of a democracy. (Para 2089)

Indian Independence Act, 1947.

Per Khanna, J.

It is difficult to restrict the scope of Article 368 because of anything said in Section 6 of the Indian Independence Act. (Para 1486)

H—Repeal of the Constitution if within the amending power

Per Sikri, C. J.

The whole Constitution cannot be repealed. (Para 81)

Per Shelat & Grover, JJ.

Since the entire Constitution cannot be repealed or abrogated by the amending body, the amending body under Article 368 cannot have the same powers as a Constituent Assembly. (Para 538)

If, however, the original power was limited to some extent, it could not be enlarged by the body possessing the limited power. That being so, even where an amending power is expressed in wide terms, it has to be exercised within the framework of the Constitution. It cannot abrogate the Constitution or frame a new Constitution or alter or change the essential elements of the constitutional structure. It cannot be overlooked that the basic theory of our Constitution is that "Pouvoir Constituent", is vested in the people and was exercised, for and on their behalf by the Constituent Assembly for the purpose of framing the Constitution. (Para 539)

Per Hegde & Mukherjea, JJ.

One cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. (Para 651)

If one or more of the basic features of Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent with those features are incorporated, it cannot still remain the Constitution referred to in Article 368. The personality of the Constitution must remain unchanged. (Para 651)

Per Ray, J.

Amendment does not mean mere abrogation or wholesale repeal of the Constitution. The Attorney-General and Mr. Seervai emphasised that an amendment would leave an organic mechanism providing the Constitution organisation and system for the State. (Para 1064)

Part IV—Article 368—Scope of amending power (*contd*)

Per Jaganmohan Reddy, J.

The amending power does not mean that the Constitution at any point of time would be so amended by way of addition, variation or repeal as to leave a vacuum in the governance of the country. (Para 1136)

It is apparent from the meaning of the word 'amendment' that it does not include 'repeal' or 'abrogation' nor is it the same as revision. (Para 1149)

A repeal of a provision of a law is different from the repeal of the law itself. (Para 1149-A)

If all the provisions of Constitution leaving the Preamble, or one article, or a few articles of the original Constitution be repealed and in their place other provisions replaced, whereby the entire structure of the Constitution, the power relationship *inter se* three Departments, the federal character of the State and the rights of the citizens vis-a-vis the State, are abrogated and new institutions, power relationships and the fundamental features substituted therefor, such an attempt would equally amount to abrogation of the Constitution, because any such exercise of the power will merely leave the husk and will amount to the substitution of an entirely new Constitution, which it is not denied, cannot be done under Article 368. (Para 1151)

Per Palekar, J.

It is the nature and character of the Constitution as a growing, organic, permanent and sovereign instrument of government which exclude the repeal of the Constitution as a whole, and not the nature and character of the Amending power. (Para 1310)

To the Constitution-makers the wholesale repeal would be unthinkable; but not necessary changes in response to the demands of time and circumstance which, in the opinion of the then amending authorities, the current constitutional instrument would be able to absorb. This is sufficient for the courts to go on as it was sufficient for the framers of the Constitution. (Paras 1239 and 1258)

Quibbling on the meaning of the word 'amendment' as to whether it also involved repeal of the whole constitution is an irrelevant and unprofitable exercise. (Para 1239)

Per Khanna, J.

Amendment of Constitution has a wide and broad connotation and would embrace within itself the total repeal of some articles or their substitution by new articles which may not be consistent with or in conformity with earlier articles. (Para 1442)

Per Mathew, J.

The power to amend under old Article 368 included the power to add any provision to the Constitution, to alter any provision, substitute any other provision in its place and to delete any provision. But when the article said that, on the bill for the amendment of the Constitution receiving the President's assent, "the Constitution shall stand amended", it seems to be fairly clear that a simple repeal or abrogation of the Constitution without substituting anything in the place of the repealed Constitution would be beyond the scope of the amending power, for, if a Constitution were simply repealed, it would not stand amended. An amendment which brings about a radical change in the Constitution like introducing Presidential system of Government for cabinet system, or, a monarchy for a republic, would not be an abrogation or repeal of the Constitution. However radical the change might be, after amendment, there must exist a system by which the State is constituted or organised. (Para 1567)

The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. That limitation flows from the language of the article itself. (Para 1784)

Per Beg, J

The only implied limitation on the power of amendment is that it may not include the power of completely abrogating the Constitution at one stroke. It, however, seems wide enough to erode the Constitution completely step by step so as to replace it by another. (Para 1835)

Per Dwivedi, J.

The whole text of a law cannot be repealed or abrogated in one step; some part of it must remain while the other is repealed. (Para 1885)

I—Conclusions on the scope, ambit and extent of the amending power —If absolute

Per Sikri, C. J.

In conclusion the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest. (Para 287)

Article 368 can amend every article of the Constitution as long as the basic structure and foundation of the Constitution remains the same. (Paras 292 and 395)

Per Shelat & Grover, JJ.

Though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features. (Para 608)

Per Hegde & Mukherjea, JJ.

If Article 368 is read by itself there can be no doubt that the power of amendment implied in that article can reach each and every Article as well as every part of the Constitution. (Para 621)

If absolute amending power is given can it be accepted that the Legislature will be bound by political compulsions making it impermissible for Parliament to exercise its amending power in a manner unacceptable to the people at large. But the peoples' will to resist an unwanted amendment cannot be taken into consideration in interpreting the ambit of the amending power. Extra legal forces work in a different plane altogether. (Para 650)

On a careful consideration of the various aspects of the case we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligations imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. (Para 666)

Part IV—Article 368—Scope of amending power *(contd.)*

So the word "amendment" in Article 368 carries with it certain limitation and, further, that the power conferred under Article 368 is subject to certain implied limitations though that power is quite large. (Para 667)

Per Palekar, J.

Amplitude of amending power is wide. (Para 1236)

Whatever provision of the constitution may be sought to be amended, the amendment is an amendment of the Constitution. The range is the whole of *this constitution* which means all the provisions of the constitution. No part of the constitution is expressly excepted from amendment. The power to amend is not made expressly subject to any other provision of the constitution. The grant of power under Article 368 is plenary, unqualified and without any limitations, except as to the special procedure to be followed. (Para 1241)

Per Khanna, J.

The power to amend under Article 368 does not include the power to completely abrogate the constitution and replace it by an entirely new constitution. Amendment of the constitution necessarily contemplates that the constitution has not to be abrogated but only changes have to be made in it. The word "amendment" postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old constitution cannot be destroyed and done away with; it is retained though in the amended form. Retention means the retention of the basic structure or framework of the old constitution. A mere retention of some provisions of the old constitution even though the basic structure or framework of the constitution has been destroyed would not amount to the retention of the old constitution. (Para 1426)

Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution. Provision regarding the amendment of the constitution does not furnish a pretence for subverting the structure of the constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction can not be described to be amendment of the Constitution as contemplated by Article 368. One cannot, while acting under Article 368, repeal the existing Constitution and replace it by a new constitution. (Paras 1426 and 1427)

The minimum of the existing constitution which should be left intact in order to hold that the existing constitution has been retained in an amended form and not done away with is that which relates to the basic structure or framework of the constitution. If the basic structure is retained, the old constitution would be considered to continue even though other provisions have undergone change. Amendment is not the same as repeal, although it may operate as a repeal to certain degree. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights. The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. (Paras 1430 to 1435)

It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. (Para 1426)

Per Mathew, J.

I do not think that there were any express or implied limitations upon the power of Parliament to amend the fundamental rights in such a way as to destroy or damage even the core or essence of the rights and the 24th Amendment, by its language, makes it clear beyond doubt. The opening words of the amended article should make it clear that no invisible radiation from any other provision of the Constitution would operate as implied limitation upon the power of amendment. Further, the amended Article 368 puts it beyond doubt that the power to amend the provisions of the Constitution is in the article itself, that the power includes the power to add, vary or repeal any provision of the Constitution, that the power is a constituent power, that the assent of the President to a bill for amendment is compulsory and that nothing in Article 13(2) will apply to an amendment under the article. (Para 1715)

Though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity. Within these limits, Parliament can amend every article. *(Para 1162)*

Per Dwivedi, J.

The nature, object and history of the amending power and the context of Article 368 leave little room for doubt that the word "amendment" includes the power of repealing or abrogating each and every provision of the Constitution. It may be that Parliament may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. (Paras 1885 and 1899)

Article 368 places only one express fetter on the amending power, that is, the procedural fetter. A substantive fetter on the amending power is accordingly not contemplated by Article 368. (Para 1905)

The scheme of Article 368 is to re-create the primary organs of State and to re-define, re-demarcate and re-limit their powers and functions if and when it becomes imperative to do so for the good of the people. Article 368 is the master, not the slave of the other provisions. Acting under Article 368, Parliament is the creator, not the creature of the Constitution. In one word, it is supreme. (Para 1927)

Per Chandrachud, J.

Article 368, manifestly, does not impose any express limitations. The power of amendment is in substance and reality a power to clarify the original intention obscured, for example, by limitations of language and experience, so as to adjust the intention as originally expressed to meet new challenges. As a nation works out its destiny, new horizons unfold themselves, new challenges arise and therefore new answers have to be found. It is impossible to meet the new and unforeseen demands on the enervated strength of a document evolved in a context which may have largely lost its relevance. The power of amendment is a safety valve and having regard to its true nature and purpose, it must be construed as being equal to the need for amendment. The power must rise to the occasion. *(Para 2060)*

J—Increase of amending power—Article 368, Proviso (e)—Scope of

Per Sikri, C. J.

Clause (*e*) of the proviso does not give any different power than what is contained in the main Article. The meaning of the expression "Amendment of the Constitution" does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended

Part IV—Article 368—Scope of amending power (*contd.*)

so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two-third majority to simple majority. Similarly it cannot get rid of the true meaning of the expression "Amendment of the Constitution" so as to derive power to abrogate fundamental rights. (Para 393)

Per Shelat & Grover, JJ.

If Article 368 conferred the power of the amplitude now covered by the 24th Amendment nothing new has been done and the amendment cannot be challenged. If, however the original power though having the constituent quality was a limited one, it could not be increased. In other words the amending body cannot enlarge its own powers. (Para 494)

If the original power was limited to some extent, it could not be enlarged by the body possessing the limited power. The power of amendment lies in the first part of Article 368. What clause (*e*) in the proviso does is to provide that if Article 368 is amended, such an amendment requires ratification by the States, besides the larger majority provided in the main part. If the amending power under Article 368 has certain limits and not unlimited Article 368 cannot be so amended as to remove these limits nor can it be amended so as to take away the voice of the States in the amending process. (Para 539)

Per Hegde & Mukherjea, JJ.

Article 368 impliedly contains the power to amend. It is difficult to accept the contention that an implied power was impliedly permitted to be enlarged. If that was so, there was no meaning in limiting that power originally. Limitation on the power to amend the Constitution would operate even when Article 368 is amended. A limited power cannot be used to enlarge the same power into an absolute power. If the power conferred on Parliament to amend the Constitution under Article 368 as it stood originally is a limited power, Parliament cannot enlarge the scope of that power. (Para 677)

A. G. for the State of New South Wales v. *The Brewery Employees Union of New South Wales*, 6 CLR 469; *Ex parte Walsh and Johnson*, 37 CLR 36 at p. 67 and *In re Yates and Australian Communist Party* v. *The Commonwealth*, 83 CLR 1, *relied on.*

Article 368(*e*) does not confer power on Parliament to enlarge its own power.

The power to amend the Constitution as well as the ordinary procedure to amend any part of the Constitution was and is contained in the main part of the Article. The proviso merely places further restrictions on the procedure to amend the Articles mentioned therein. At best clause (*e*) of the proviso merely indicates that Article 368 itself comes within its own purview. (Para 676)

Per Ray, J.

The provisions of Article 368 itself, which is the most important part of the Constitution may be changed. (Para 905)

Whether under proviso (*e*) to the unamended Article 368 the power of amendment could be increased is answered in the affirmative. Because first, under Article 368, proviso (*e*) any limitation on the power of amendment alleged to be found in any other Article of the Constitution can be removed. Secondly, judicial decisions show that by amending the Article conferring the power of amendment a greater power to amend the Constitution can be obtained than was conferred by the original Article. A controlled Constitution can be converted into an uncontrolled Constitution vastly increasing the power of amendment and thirdly, the power to amend the amending Article must include the power to add, alter or repeal any part of that Article and there is no reason why the addition cannot confer a power of amendment which the authorities named in Article 368 did not possess. By the exercise of the amending power provision can be made which can increase the powers of Parliament or increase the powers of the States. Again, by amendment future amendments can be made more difficult. (Paras 919, 920, 921 and 922)

Part IV—Article 368—Scope of amending power (*contd.*)

Ryan's case, 1935 Irish Reports 170 and *Ranasinghe case*, 1965 AC 172, *relied on.*

The Constituent Assembly provided in clause (*e*) to Article 368 express and specific power of amendment of Article 368 itself. The provision of clause (*e*) in the proviso to Article 368 is not limited to federal features. (Paras 923 and 924)

Per Jaganmohan Reddy, J.

The amplitude of the power of amendment in Article 368 cannot be enlarged by amending the amending power under proviso (*e*) to Article 368. (Para 1150)

Per Palekar, J.

Article 368 does not contain any express limitation. On the other hand, the power is wide enough even to amend the provisions of Article 368. See proviso (*e*) of that Article. In other words, Article 368 contains unqualified and plenary powers to amend the provisions of the constitution including the Amending clause. Where power is granted to amend the Amending power, as in our constitution, there is no limit to the extent this may be done. It may be curtailed or 'enlarged'. (Paras 1288 and 1294)

Since there is no dispute in our case that by reason of clause (*e*) of proviso of Article 368 power is given to amend the amendatory power, it was open to Parliament to 'enlarge' the power by amendment. (Para 1294)

There is nothing in the Constitution which prohibits or in any other way prevents the enlargement of powers of Parliament as a result of constitutional amendment and such an amendment cannot be held to be impermissible or beyond the purview of Article 368. Article 368 itself gives, inter alia, the power to amend Article 368 and an amendment of Article 368 which has been brought about in the manner prescribed by that article would not suffer from any constitutional or legal infirmity. (Para 1484)

Per Mathew, J.

Even if it be assumed that the actual power for amendment under the article was limited, Article 368 gave the Amending Body a potential power, to enlarge or contract the limit of the actual power. The potential power when exercised by the Amending Body makes the actual power either enlarged or contracted. The wording of proviso clause (*e*) to Article 368, makes it clear that the object of the amendment of the article is to make change in Article 368. (Para 1718)

Per Beg, J.

Article 368 expressly provided either for the expansion or diminution of the scope of the powers of amendment. It cannot, therefore, be reasonably contended that the power of recreation even of the whole Constitution by stages was not already contained in the unamended Article 368. This part of the proviso also shows that the Constitution-makers contemplated a wide amending power so as to meet the challenges of the times offered by rapidly changing social, political, economic, national, and International conditions and situations. (Para 1850)

Per Dwivedi, J.

Article 368 places no express limits on the amending power. Indeed, it expressly provides for its own amendment. Parliament and more than half of the States may jointly repeal Article 368 and thus make fundamental rights immutable if they so desire. (Para 1932)

Article 368 itself can be amended to enlarge the amending power. (Para 1925)

Part IV—Article 368—Scope of amending power *(contd.)*

K—Judicial Review of exercise of amending power—Testing the validity of Constitutional Amendments—Basis of—Whether judicial review at all proper—Whether it would make judiciary supreme.

Per Sikri, C. J.

It is of course for Parliament to decide whether an amendment is necessary. The courts will not be concerned with the wisdom of the amendment. (Para 288)

Per Shelat & Grover, JJ.

It is difficult to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process. There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. (Para 577)

Bidi Supply Co. v. *Union of India*, 1956 SCR 267 : AIR 1956 SC 479; *State of Madras* v. *V. G. Row*, 1952 SCR 597 : AIR 1952 SC 196; *A. G. for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, 1914 AC 237 and *Ex parte Walsh and Johnson*, (1925) 37 CLR 36 at p. 58, *relied on*.

Judicial review of Constitutional amendments may seem involving the court in political questions, but it is the court alone which can decide such an issue. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the legislature conferred by the constitution would always be a question of interpretation of the Constitution. (Para 577)

Commonwealth of Australia v. *Bank of New South Wales*, 1950 AC 235 at 310, *relied on*.

Per Ray, J.

If in the ultimate analysis it is the Court which will pronounce on the amendment as to whether it is permissible or not, this construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the courts. By reading into the Constitution inherent limitations to extinguish the validity of all amendments on the principles of essential features of the Constitution which are undefined and untermed, the courts will have to lay down a new Constitution. Thus judiciary becomes supreme. (Paras 906 and 941)

Per Jaganmohan Reddy, J.

There is no constitutional matter which is not in some way or the other involved with political, social or economic questions, and if the Constitution-makers have vested in this Court a power of judicial review, and while so vesting, have given it a permanent place describing it as the heart and soul of the Constitution, we will not be deterred from discharging that duty, merely because the validity or otherwise of the legislation will affect the political or social policy underlying it. The basic approach of this Court has been, and must always be, that the Legislature has the exclusive power to determine the policy and to translate it into law, the constitutionality of which is to be presumed, unless there are strong and cogent reasons for holding that it conflicts with the constitutional mandate. (Para 1104)

The Courts have a duty, and have indeed the power, to re-examine and re-state the law within the limits of its interpretative function in the fullness of the experience during

Part IV—Article 368—Scope of amending power (*contd.*)

which it was in force so that it conforms with the socio-economic changes and the jurisprudential outlook of that generation. (Para 1106)

The State has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts have no function in the evaluation of these policies or in determining whether they are good or bad for the community, they have, however, in examining legislative action taken by the State in furthering the ends. to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined. (Para 1180)

Per Palekar, J.

It may appear as very odd that while the framers of the Constitution did not think it necessary to expressly exclude even one provision of the constitution from being amended, they still intended that this Court, as the guardian of the constitution, should make parts of it unamendable by implying limitation on the Amending power. Indeed this Court is a guardian of the constitution in the sense that it will not permit its contravention by any of its instrumentalities but it cannot constitute itself a guardian against change constitutionally effected. (Para 1285)

As a matter of fact any amendment to the constitution which the representative of the people want to make is professedly an improvement. Improvement or non-improvement cannot be the true test of an amendment. (Para 1257)

Per Khanna, J.

An amendment of the Constitution in compliance with the procedure prescribed by Article 368 cannot be struck down by the court on the ground that it is a change for the worse. It would by tantamount to the court substituting its own opinion for that of the Parliament. (Para 1442)

Whether the amendment is, in fact, an improvement or not, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. (Para 1436)

Per Mathew, J.

Just as an ordinary law derives its validity from its conformity with the constitution, so also, an amendment of the constitution derives its validity from the constitution. An Amendment of the constitution can be ultra vires just as an ordinary law can be. Irrespective of the subject-matter, the moment a provision becomes validly embodied in the constitution, it acquires a validity of its own which is beyond challenge and the question whether it relates to constitutional law with reference to the subject-matter is wholly irrelevant. (Paras 1575 and 1578)

If Parliament, in its capacity as the Amending Body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court cannot adjudge the constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant. Judicial review of a constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the Fundamental Rights embodied in Part III is impermissible. Taking for granted, that by and large that Fundamental Rights are the extensions, permutations and combinations of natural rights in the sense explained in this judgment, it does not follow that there is any inherent limitation by virtue of their origin or character in their being taken away or abridged for the common good. The source from which these rights derive their moral sanction and transcendental character, namely, the natural law, itself recognizes that

Part IV—Article 368—Scope of amending power (*contd.*)

natural rights are only prima facie rights liable to be taken away or limited in special circumstances for securing higher values in a society or for its common good. But the responsibility of the Parliament in taking away or abridging a Fundamental Right is an awesome one and whenever a question of constitutional amendment which will have the above effect comes up for consideration, Parliament must be aware that they are the guardians of the rights and liberties of the people in a greater degree than the courts, as the courts cannot go into the validity of the amendment on any substantive ground. (Para 1714)

The Supreme Court has no power under the Constitution to adjudge a constitutional amendment as unconstitutional on the ground that the amendment would in effect vest large powers in Parliament and State legislatures to pass laws which might violate Articles 14, 19 and 31. Whatever one's personal views might be about the wisdom of Article 31-C, whatever distrust one might have in the attempt at improving society by what one may think as futile if not mischievous economic tinkering, it is not for the court to prescribe for the society or deny the right of experimentation to it within very wide limits.
(Paras 1771 and 1776)

Per Beg, J.

Over the amending power in Article 368 the control of the judicature is limited to seeing that the form and the manner of the amendment is properly observed. No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But, when these authorities act within these limits, it cannot interfere. (Para 1816)

Courts of justice have no means of control over a power expressly sanctioned by the Constitution which is the legal sovereign. They can only speak for the Constitution. Through their pronouncements must be heard the voice of the Constitution and of nothing beyond it. (Para 1847)

Per Dwivedi, J.

The Constitution does not recognise the supremacy of the Court over Parliament. We may test legislative laws only on the touchstone of authoritative norms established by the Constitution. Constitution's procedural limitations aside, neither Article 368 nor any other part of the Constitution has established in explicit language any authoritative norms for testing the substance of a constitutional amendment. (Para 1944)

Judicial review of Constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and true republicanism postulate the settlement of social, economic and political issues by public discussion and by the vote of the people's elected representatives, and not by judicial opinion. The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it. (Para 1947)

Per Chandrachud, J.

Apart from constitutional limitations, no law can be struck down on the ground that it is unreasonable or unjust. No provision incorporated in a Constitution at the time of its original enactment can ever be struck down as unconstitutional. The same test must apply to what becomes a part of that constitution by a subsequent amendment, provided that the conditions on which alone such amendments can be made are strictly complied with.
(Para 2091)

PART V—CONSTITUTION (TWENTY-FOURTH) AMENDMENT ACT, 1971

A—Object & Scope—Source of amending power made explicit as lying in Article 368.

Per Sikri, C. J.

Counsel for the petitioner rightly conceded that Parliament could validly amend Article 368 to transfer the source of amending power from List I, Entry 97 to Article 368. (Para 389)

Per Shelat & Grover, JJ.

If Article 368 conferred the power of the amplitude now covered by the 24th Amendment nothing new has been done and the amendment cannot be challenged. If, however the original power though having the constituent quality was a limited one, it could not be increased. In other words the amending body cannot enlarge its own powers. (Para 494)

Per Beg, J.

Twenty-fourth Amendment merely clarifies the original intention to lodge a wide amending power within the bosom of Article 368. (Para 1825)

B—Section 2 of 24th Amendment Act, 1971—Insertion of clause (4) in Article 13—Effect—Validity.

Per Sikri, C. J.

The amendment of Article 13(2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorise abrogation or the taking away of fundamental rights. After the amendment now a law which has the effect of merely abridging a right while remaining within the limits laid down would not be liable to be struck down. (Para 395)

Per Hegde & Mukherjea, JJ.

Articles 13(4) and 368(3) make explicit what was implicit. (Para 675)

Per Ray, J.

The amendment of Article 13 by an insertion of sub-article (4) is also reinforced by the opening words introduced in Article 368 by the 24th Amendment, viz., notwithstanding anything contained in this Constitution, which would certainly exclude Article 13. (Para 915)

C—Section 3(a) of 24th Amendment Act, 1971—Marginal Note—Substitution of—Effect.

Per Hegde and Mukherjea, JJ.

We have already come to the conclusion that Article 368 as it originally stood comprehended both power as well as procedure to amend the Constitution. Hence the change effected in the marginal note has no significance whatsoever. (Para 674)

Per Ray, J.

The change in marginal note was necessary because *Golak Nath* held the power to amend outside Article 368. (Para 912)

D—Section 3(b) of 24th Amendment Act, 1971

"Notwithstanding anything in the Constitution"—Effect of this expression.

Part V—Constitution (Twenty-fourth) Amendment Act, 1971 (*contd.*)

Per Sikri, C. J.

If the words "notwithstanding anything in the Constitution" are designed to widen the meaning of the word "Amendment of the Constitution" it would have to be held void as beyond the amending power. But in fact they have the effect to get rid of the argument that Article 248 and Entry 97 List I contain the power of amendment. (Para 394)

"In exercise of Constituent power"—Effect of this expression.

Per Sikri, C. J.

The insertion of the words "in exercise of its constituent power" only serves to exclude Article 248 and Entry 97 List I and emphasize that it is not ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution. (Para 394)

Per Hegde & Mukherjea, JJ.

The expression 'constituent power' is used to describe only the nature of the power of amendment. Every amending power, however large or however small it might be, is a facet of a constituent power. The power, though described to be 'constituent power', still continues to be an 'amending power'. The scope and ambit of the power is essentially contained in the word 'amendment'. Hence, from the fact that the new Article specifically refers to that power as a constituent power, it cannot be understood that the contents of the power have undergone any change. The power conferred under the original Article being a limited power to amend the Constitution, the constituent power to amend the Constitution referred to in the amended Article must also he held to carry with it the limitations to which that power was subject earlier. (Para 674)

Per Ray, J.

The constituent power under the Constitution belonged to Parliament because the Constitution gave it. The 24th Amendment made explicit what the judgment in *Sankari Prasad case* and the majority judgment in *Sajjan Singh case* and the dissenting judgments in *Golak Nath case* said, namely, that Parliament has the constituent power to amend the Constitution. (Para 913)

Per Jaganmohan Reddy, J.

Article 13(2) was confined only to the ordinary legislative laws and not one made under Article 368, the addition of clause (1) to Article 368 insofar as it declares that when Parliament exercises the power under that provision it exercises its constituent power and makes explicit what was implicit. The amendment, therefore, makes no change in the position which prevailed before the amendment. (Para 1121)

"Amend by way of addition, variation or repeal"—If amplification of the word "amend"—Effect—If amending power widened.

Per Hegde & Mukherjea, JJ.

There is also no significance in the substitution of the expression "amend by way of addition, variation or repeal of any provision of this Constitution" found in the amended Article in the place of the expression "amendment of the Constitution" found in the original Article. Every power to amend a statute must necessarily include within itself some power to make addition, variation or repeal of any provision of the statute. Here again, the power conferred under the original Article being a limited one, that limitation will continue to operate notwithstanding the change in the phraseology. (Para 674)

Per Ray, J.

Golak Nath case raised a doubt as to the meaning of the word "amendment". The 24th Amendment has expressly clarified that doubt. (Paras 913 & 914)

Part V—Constitution (Twenty-fourth) Amendment Act, 1971 (*contd.*)

Per Jaganmohan Reddy, J.

The substitution of the word "amendment" by the expression "amend by way of addition, variation or repeal" makes no difference as it bears the same meaning as the word "amendment". (Para 1147)

Per Khanna, J.

The words "by way of addition, variation or repeal" merely amplify the meaning of the word "amend" and clarify what was already implicit in that word. It, however, cannot be said that if the words "by way of addition, variation or repeal" had not been there, the power of amendment would not have also included the power to add, vary or repeal. (Para 1439)

E—Section 3(c) of 24th Amendment Act, 1971—President's assent made obligatory—Validity.

Per Hegde & Mukherjea, JJ.

The amended Article prescribes that when the Bill is presented to the President, he "shall give his assent to the Bill". The question of inappropriateness of commanding the President is a question of propriety. The substance of the matter is that when the Bill is presented to the President, he shall not withhold his assent. This change cannot be said to have damaged or destroyed any basic element of the Constitution. (Para 674)

F—Conclusions as to the validity of 24th Amendment Act, 1971

Per Sikri, C. J.

Article 368 can amend every article of the Constitution as long as the basic structure and foundation of the Constitution is not changed. Therefore 24th Amendment is valid. (Paras 392 & 396)

Per Shelat & Grover, JJ.

The validity of the 24th amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every Article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity. (Para 583)

Per Hegde & Mukherjea, JJ.

The scope of Parliament's power to amend the Constitution or any part thereof must be held to have remained as it was before the 24th Amendment notwithstanding the alterations made in the phraseology of Article 368. The 24th Amendment made explicit, what was implicit in the unamended Article 368. In this view of the matter the 24th Amendment must be held to be valid. (Paras 673 & 678)

Per Ray, J.

The 24th Amendment is valid. (Para 1064)

Per Jaganmohan Reddy, J.

I hold the 24th Amendment valid, for it has the same amending power as it existed before the amendment. (Para 1162)

Per Palekar, J.

On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any

Part V—Constitution (Twenty-fourth) Amendment Act, 1971 (*contd.*)

limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the Amendments which are in question here must be deemed to be valid. (Para 1318)

Regarding the argument of abuse of power, there is no power which cannot be abused. All constitutions grant power to legislatures to make laws on a variety of subjects and the mere possibility of the power being used unwisely, injuriously or even abused is not a valid ground to deny legislative power. If that is the position with regard to legislative power, there does not appear to be any good reason why the possibility of abuse of it by the legislature should inhibit an amendment of the Constitution which gives the power. The possibility of abuse of a power given by an amendment of the Constitution is not determinative of the validity of the amendment. (Para 1319)

Bank of Toronto v. *Lambe*, (1887) 12 AC 575, 586-587.

Per Khanna, J.

There is no infirmity in the Constitution (Twenty-fourth Amendment) Act and is therefore valid. (Para 1510)

Per Mathew, J.

Article 368, as it stood before the Amendment, conferred plenary power to amend all the provisions of the Constitution and the 24th Amendment, except in one respect, namely, the compulsory character of the assent of the President to a Bill for amendment, is declaratory in character. (Para 1716)

Per Beg, J.

Twenty-fourth Amendment is valid. (Para 1851)

Per Dwivedi, J.

Twenty-fourth Amendment is valid. (Paras 1955 & 1958)

Per Chandrachud, J.

Twenty-fourth Amendment is valid. (Paras 2109 & 2110)

PART VI—CONSTITUTION (TWENTY-FIFTH) AMENDMENT ACT, 1971

A—Section 2(a)—Validity of substitution of new clause (2) in Art. 31—Insertion of the word "amount" instead of compensation—Adequacy of compensation made non-justiciable—Whether right of property abrogated—Whether an essential feature of the Constitution changed.

New Article 31(2)—Scope—Mischief rule—Meaning of "amount"—Whether a word of art—Effect of the change made—Whether scope of judicial review on aspects other than adequacy of compensation affected.

Per Sikri, C.J.

The object of the 25th Amendment is to modify the decision given by the Supreme Court in *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248, where it was held by ten Judges that the Banking Companies (Acquisition and Transfer of Undertakings) Act violated the guarantee of compensation under Article 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed the amounts so declared could not be regarded as compensation. (Para 398)

SCC Online Web Edition Academic

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Article 31(2) as it stood before and after the 25th Amendment, the following changes seem to have been effected. Whereas before the amendment, Article 31(2) required the law providing for acquisition to make provision for compensation by either fixing the amount of compensation or specifying the principles on which and the manner in which the compensation should be determined after the amendment, Article 31(2) requires such a law to provide for an "amount" which may be fixed by the law providing for acquisition or requisitioning or which may be determined in accordance with such principles and given in such manner as may be specified in such law. In other words, for the idea that compensation should be given, now the idea is that an "amount" should be given. This amount can be fixed directly by law or may be determined in accordance with such principles as may be specified. (Para 399)

It is very difficult to comprehend the exact meaning which can be ascribed to the word "amount". In this context, it is true that it is being used in lieu of compensation, but the word "amount" is not a legal concept as "compensation" is. The figurative meaning of "amount" given by ***Oxford English Dictionary***, viz., the full value, cannot be given because of the deliberate omission of the word "compensation" and substitution of the word "amount" in lieu thereof. (Paras 400 to 403)

The article postulates that in some cases principles may be laid down for determining the amount and these principles may lead to an adequate amount or an inadequate amount. So this shows that the word "amount" here means something to be given in lieu of the property to be acquired but this amount has to and can be worked out by laying down certain principles. These principles must then have a reasonable relationship to the property which is sought to be acquired. If this is so, the amount ultimately arrived at by applying the principles must have some reasonable relationship with the property to be acquired; otherwise the principles of the Act could hardly be principles within the meaning of Article 31(2). (Para 404)

The amount has to be fixed by law but the amount so fixed by law must also be fixed in accordance with some principles because it could not have been intended that if the amount is fixed by law, the legislature would fix the amount arbitrarily. So the amount, if fixed by the legislature, has also to be fixed according to some principles. These principles cannot be different from the principles which the legislature would lay down. (Paras 405 and 406)

It must be borne in mind that Article 31(2) is still a fundamental right. The change effected is that a person whose property is acquired can no longer claim full compensation or just compensation but he can still claim that the law should lay down principles to determine the amount which he is to get and these principles must have a rational relation to the property sought to be acquired. If one were to interpret Article 31(2) as meaning that even an arbitrary or illusory or a grossly low amount could be given, which would shock not only the judicial conscience but the conscience of every reasonable human being, a serious question would arise whether Parliament has not exceeded its amending power under Article 368 of Constitution. The substance of the fundamental right to property, under Article 31, consists of three things; one the property shall be acquired by or under a valid law; secondly, it shall be acquired only for a public purpose; and, thirdly, the person whose property has been acquired shall be given an amount in lieu thereof, which is not arbitrary, illusory or shocking to the judicial conscience or the conscience of mankind. Parliament cannot empower legislatures to fix an arbitrary amount or illusory amount or an amount that virtually amounts to confiscation, taking all the relevant circumstances of the acquisition into consideration. Same considerations apply to the manner of payment. This cannot mean that an arbitrary manner of payment is contemplated. The discretion conferred on the legislature has to be exercised reasonably. (Paras 407 and 408)

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Roberts v. *Hopwood*, 1925 AC 578; 590 and *James Leslie Williams* v. *Haines Thomas*, 1911 AC 381, *relied on.*

In view of the above interpretation, Parliament has not exceeded its amending power under Article 368 in enacting the new Article 31(2). Therefore, Section 2 of Constitution (Twenty-fifth) Amendment Act, 1971 is valid. (Paras 415 and 416)

Per Shelat and Grover, JJ.

The word "amount" unlike the word "compensation" has no legal connotation. It is a neutral, colourless word. The dictionary meanings do not help in arriving at its true import as used in a constitutional provision. It can be anything from one paise to an astronomical figure in rupees. Its meaning has, therefore, to be ascertained by turning to the context in which it is used and the words preceding it as well as following it. (Para 585)

It is significant that the amount can be determined in accordance with specified principles, if it is not fixed by the law itself. Moreover, its adequacy cannot be questioned in a court. The use of the word "principles" and the question of inadequacy can only arise if the amount has some norm. If it has no norm no question of specifying any principles arises nor can there be any occasion for the determination of its adequacy. The very fact that the court is debarred from going into the question of adequacy shows that the "amount" can be adequate or inadequate. Even if it is inadequate, the fixation or determination of that amount is immune from any challenge. It postulates the existence of some standard or norm without which any enquiry into adequacy becomes wholly unnecessary and irrelevant. Moreover, either method of giving an amount must bring about the same result. (Para 586)

It is not right to contend that the right of the owner is just what the government determines it to be. It can give what it pleases and when it choses to do so. Such an argument is untenable and introduces an element of arbitrariness which cannot be attributed to the Parliament. (Para 587)

It was open to the courts to go into the question of arbitrariness of the amount fixed or its being illusory even under the law laid down in the case of *Shantilal Mangaldas*. The relevance of the principles had also been held to be justiciable.

State of Gujarat v. *Shantilal Mangaldas*, (1969) 3 SCR 341: (1969) 1 SCC 509, *relied on.*
R.C. Cooper v. *Union of India*, (1970) 3 SCR 530: (1970) 1 SCC 248, *harmonized.*

The legislature cannot fix the "amount" arbitrarily. There would be discussion in the legislature for which the entire basis has to be disclosed. There can be no basis if there is no standard or norm. The members of the legislature must have some basis or principles before them to fix the amount as the same cannot be done in an arbitrary way. In fixing the "amount", the legislature has to act on some principle. This not because of any particular obligation arising out of Article 31(2) but from the general nature of legislative power itself. Whatever, the subject or the nature of legislation it always proceeds on a principle—it is based on legislative policy. The principle may include considerations of social justice. Judicial review on the ground of inadequacy of the "amount" and the manner of payment is excluded by express language. No other question is excluded. The expropriated owner still continues to have a fundamental right. (Paras 589 and 590)

The obligation to act on some principle while fixing the amount arises both from Article 31(2) and from the nature of the legislative power. For, there can be no power which permits in a democratic system an arbitrary use of power. If an aggrieved owner approaches the Court the norm or the principles of fixing or determining the "amount" will have to be disclosed to the Court. It will have to be satisfied that the "amount" has reasonable relationship with the value of the property acquired or requisitioned and one or more of the relevant principles have been applied and further that the "amount" is neither illusory nor it has been fixed arbitrarily, nor at such a figure that it means virtual deprivation of the

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 *(contd.)*

right under Article 31(2). The question of adequacy or inadequacy, however, cannot be gone into. (Para 591)

As to the mode of payment, there is nothing to indicate in the amended Article that any arbitrary manner of payment is contemplated. It is well known that a discretion has to be exercised reasonably. (Para 592)

Section 2 of the 25th Amendment can be substained on the construction given to it above. (Para 593)

Therefore, clause (2) of Article 31, as substituted by Section 2 of the 25th Amendment, does not abrogate any basic element of the Constitution nor does it denude it of its identity because; (*a*) the fixation or determination of "amount" under that Article has to be hased on some norm or principle which must be relevant for the purpose of arriving at the amount payable in respect of the property acquired or requisitioned; (*b*) the amount need not be the market value but it should have a reasonable relationship with the value of such property; (*c*) the amount should neither be illusory nor fixed arbitrarily; and (*d*) though the courts are debarred from going into the question of adequacy of the amount and would give due weight to legislative judgment, the examination of all the matters in (*a*), (*b*) and (*c*) above is open to judicial review. (Para 608)

The scheme of Article 31(2) now is:

(1) The property has to be compulsorily acquired or requisitioned.
(2) It has to be for a public purpose.
(3) It has to be by a law.
(4) The law must provide for an amount which may be—
  (*i*) fixed by such law, or,
  (*ii*) which may be determined in accordance with such principles as may be specified in such law.
(5) The law shall not be questioned in a Court on the ground—
  (*i*) the amount so fixed or determined is not adequate, or
  (*ii*) the whole or any part of such amount is to be given otherwise than in cash. (Para 586)

Per Hegde & Mukherjea, JJ.

To determine the scope of Article 31(2), the Constituent Assembly Debates cannot be used as an aid. It is a well settled rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of the provisions of the statute. The same rule is applicable when we are called upon to interpret the provisions of a Constitution In fact we must apply the Mischief Rule to find the true scope of Article 31(2). (Paras 683 and 690)

The Supreme Court has consistently laid down that the power of the Parliament to fix the compensation for the property acquired is not an arbitrary power. Further, the principles prescribed for determining the compensation must be relevant to the subject-matter of acquisition or requisition. Also that both the questions, whether the compensation has been fixed arbitrarily or whether the principles laid down are irrelevant, are open to judicial review. (Para 697)

State of W. B. v. *Bela Bannerjee,* 1954 SCR 558: AIR 1954 SC 170 and *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras,* (1965) 1 SCR 614: AIR 1965 SC 1017, *considered.*

State of Gujarat v. *Shantilal Mangaldas,* (1969) 1 SCC 509 and *Bank Nationalisation case* (*R. C. Cooper* v. *Union of India*), (1970) 1 SCC 248, *explained.*

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Union of India v. *Metal Corporation of India Ltd.*, (1967) 1 SCR 255: AIR 1967 SC 637, *referred.*

The word "compensation" has been interpreted in the various decisions as "just equivalent" of the value of the property taken. That concept has now been removed. If the Parliament intended to take away the judicial review in any respect other than relating to the adequacy of the amount fixed, it would have expressed its intention by appropriate words. Therefore Parliament has accepted the interpretation placed by this Court in all respects except as regards the concept of compensation. What the 25th Amendment makes non-justiciable is an enquiry into the question whether the amount fixed or determined is an equivalent value of or 'compensation' for the property acquired or requisitioned. (Para 699)

The word "amount" is a neutral word. Standing by itself, it has no norm and is completely colourless. The dictionary meaning of the word appropriate to the present context is "sum total or a figure". We have to find out its connotation from the context. In so doing, we have to bear in mind the fact that Article 31(2) still continues to be a fundamental right. (Para 700)

The legislatures are permitted under the amended Article 31(2) either to fix the "amount" to be paid in lieu of the property acquired or to lay down the principles for determining that "amount". These two alternative methods must bring about nearly the same result. If the relevancy of the principles fixed can be judicially reviewed in view of the decisions referred to earlier, we fail to see how the fixation of the "amount" which is the alternative method of determining the recompense to be paid in lieu of the property taken is excluded from judicial review. The word "fixed" in Article 31(2) connotes or postulates that there must be some standard or principle by the application of which the legislature calculates or ascertains definitely the amount. So it would be necessary for the legislature to lay down in the law itself or otherwise indicate the principles on the basis of which it fixes the amount for the acquisition or requisitioning of the property. (Paras 703 and 704)

If this construction is placed on the first mode of determining the amount, then there would be no difference between this method, and the other method whereby the legislature lays down the principles and leaves it for any other authority to determine the amount in accordance with such principles. The content of the right in Article 31(2) is not dependent upon whether the legislature chooses one or the other method of determining the amount. There is no contradiction between these two methods. It is true that in both cases, the judicial review is necessarily limited because it cannot extend to the examination of the adequacy of the amount fixed or to be determined. The "amount" payable has to be determined on the basis of principles relevant for determining the value of the property acquired or requisitioned. (Para 704)

The State action is still described as 'acquisition or requisition' and not 'confiscation'. Therefore, the principles for fixing or determining the amount must be relevant to the 'acquisition or requisition', and not to 'confiscation'. The amount fixed or determined should not make it appear that the measure is one of confiscation. In the very nature of things, the "amount" payable has to be determined on the basis of certain principles. Therefore then, the legislators must have some principles before them to determine the amount. It cannot be suggested that there would be no discussion in the Parliament on the principles for determining amount and that members of ruling party would blindly accept them and opposition will have no opportunity to criticise them. (Paras 705 and 706)

If we bear in mind the fact that the "amount" in question is to be paid in lieu of the property taken, then it follows that it must have a reasonable relationship with the value of the property taken. It may not be the market value of the property taken. The market value of a property is the result of an inter-action of various forces. It may not have any reasonable relationship with the investment made by its successive owners. It is undoubtedly open to the State to appropriate to itself that part of the market value of a property which

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

is not the result of any contribution made by its owners. In this regard the legislative judgment is entitled to great weight. However, so long as the basis adopted for computing the value of the property is relevant to the acquisition in question or the amount fixed can be justified on any such basis, it is no more open to the court to consider whether the amount fixed or to be determined is adequate. But it is still open to the court to consider whether the "amount" in question has been arbitrarily determined or whether the same is an illusory return for the property taken. It is also open to the court to consider whether the principles laid down for the determination of the amount are irrelevant for the acquisition or requisition in question. Therefore, the amended Article 31(2) is valid. (Para 707)

Per Ray, J.

After the substitution of the neutral expression "amount" for "compensation" in Article 31(2) by the Constitution (25th Amendment) Act the Article still binds the legislature to provide for the giving to the owner a sum of money either in cash or otherwise. The legislature may either lay down principles for the determination of the amount or may itself fix the amount. It cannot be said that the legislature would be under the necessity of providing a standard to measure an adequacy with reference to fixing the amount. The Constitution does not allow judicial review of a law on the ground of adequacy of the amount and the manner as to how such amount is to be given otherwise than in cash. (Para 1019)

The word "amount" in Article 31(2) after the 25th Amendment is to be read in the entire collection of words. In Article 31(2) the use of the word "amount" in conjunction with payment in cash shows that a sum of money is being spoken of. Amount is a sum meaning, a quantity or amount of money, or, in other words, amount means a sum of money. In fixing the amount or compensation the legislature is not required to set out in the law the principles on which compensation had been fixed in the unamended clause or the amount is fixed in the amended clause. (Paras 1023 and 1024)

Just as the amount can be fixed on principles of social justice the principles for determining the amount can be specified on the same consideration of social justice. No reasons for fixing amount would or need appear in the legislation. If any person aggrieved by the amount fixed challenges, the Court can neither go into the question of adequacy nor as to how the amount is fixed. If adequacy cannot be questioned any attempt to find out as to why the particular amount is fixed or how that amount has been fixed by law will be examining the adequacy which is forbidden as the constitutional mandate. If one alleges that the amount is illusory one will meet the insurmountable constitutional prohibition that the adequacy or the alleged arbitrariness of the amount fixed is not within the area of challenge in courts. The amount fixed is not justiciable. The adequacy cannot be questioned. The correctness of the amount cannot be challenged. The principles specified are not justiciable. (Paras 1046 to 1048)

If on the other hand, the legislature does not fix the amount but specifies the principles for determining the amount, the contention that principles for determining the amount must not be irrelevant loses all force because the result determining the amount by applying the specified principles cannot be challenged on the ground of inadequacy. If principles are specified for determining the amount and as a result of the application of the principles the result is less than the market value it will result in the same question of challenging adequacy. The relevancy of the principles cannot be impugned. Nor can the resonableness of the principles be impeached. (Paras 1049 and 1050)

Per Jaganmohan Reddy, J.

The Legislature, even in cases where it fixes an amount for the acquisition or requisition of a property, must be presumed to have fixed it on some basis, or applied some criteria or principles to determine the amount so fixed, and, therefore, where the law is challenged on the ground of arbitrariness, illusoriness or of having been based on irrelevant principles or

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

any other ground that may be open to challenge by an expropriated owner, the State will have to meet the challenge, and the Court will have to go into these questions. This will be so even in respect to the manner of payment. (Para 1166)

Notwithstanding this amendment, it is apparent that the expropriated owner still continues to have the fundamental right that his property will not be acquired save by the authority of law and for a public purpose. These propositions have been admitted by the learned Solicitor-General. The question whether an acquisition is for a public purpose is justiciable. Only the adequacy of the amount is not. (Para 1168)

Section 2 of the Twenty-fifth Amendment valid. (Para 1170)

Per Palekar, J.

By substituting "compensation" by "amount" in Article 31(2) all that the amendment has done is to negative the interpretation put by this Court on the concept of compensation. (Para 1319)

Per Khanna, J.

Whatever may be the connotation of the word "amount", it would not affect the validity of the amendment made in Article 31(2). Another change made in Article 31(2) is that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" fixed or determined for the acquisition or requisition of the property is to be given otherwise than in cash. I have not been able to find any infirmity in the above change made in Article 31(2). (Para 1513)

Per Mathew, J.

When property is acquired for implementing the directive principles under Article 39(*b*) or 39(*c*), there is no ethical obligation upon the State to pay the full market value. No absolute principle of justice requires it. An adequate theory of social justice should enable one to draw the line between justifiable and unjustifiable cases of confiscation. (Paras 1736 and 1737)

The whole purpose of the amendment was to exclude judicial review of the question whether the 'amount' fixed or the principle laid down by law is adequate or relevant. (Para 1747)

When the Cabinet formulates a proposal for acquisition of property, it will have the relevant materials to fix the amount to be paid to the owner or the principles for its fixation. Several factors will have to be taken into account for fixing the amount or laying down the principles; the nature of the property sought to be acquired, the purpose for which the acquisition is being made, the real investment of the owner excluding the fortuitous circumstances like unearned increment and also marginal utility of the property acquired to the owner. Principles of social justice alone will furnish the yardstick for fixing the amount or for laying down the principles. The principle of social justice will not furnish judicially mangeable standards either for testing the adequacy of the amount or the relevancy of the principle. The article as amended provides no norm for the Court to test the adequacy of the amount or the relevancy of the principle. The word 'amount' conveys no idea of any norm. It supplies no yardstick. It furnishes no measuring rod. The neutral word 'amount' was deliberately chosen for the purpose. (Paras 1750 and 1751)

The question of reasonableness of the amount or the relevancy of the principle is entirely outside the judicial ken. (Para 1761)

I do not propose to decide nor is it necessary for the purpose of adjudging the validity of the 25th Amendment whether a law fixing an amount which is illusory or which is a fraud on the Constitution, can be struck down by the Court. If we are to import into the concept of 'amount' the implication of reasonableness with reference to the market value of the property, it would immediately open the door to the justiciability of the question of

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

the adequacy of the amount fixed or determined which the sub-article expressly says it is not open to the Court to go into. (Paras 1754 and 1757)

The Fundamental Right to property is attenuated to a certain extent. But it is not wholly taken away. The right that the property could be acquired only under a law fixing an amount or the principles for determining it and for a public purpose would still remain. This Court can strike down an amendment of the Constitution only on the ground that the amendment was not made in the manner and form required by Article 368, or that the amendment was made in violation of some express or implied limitation upon the power of amendment.

A constitutional amendment which provides for the law fixing the 'amount' or the principles for determining the amount instead of compensation or the principles for its determination and which deprives the Court of the power of judicial review of the question whether the amount or the principles fixed by law is adequate or are relevant, cannot be adjudged bad on the ground of some invisible radiation from the concept that the right to acquire, hold or dispose of property is a Fundamental Right. There is no conceivable basis on which I can strike down the amendment to Article 31(2). (Paras 1759 and 1761)

Per Beg, J.

On Amendment of Article 31(2), I agree with Ray, Mathew and Dwivedi, JJ. (Para 1856)

Per Dwivedi, J.

It will not be proper to import the concept of compensation in Article 31(2). Section 2 of the 25th Amendment has substituted the word 'compensation' by the word 'amount' at every relevant place in Article 31(2). The Court should not minimize or neutralize its operation by introducing notions taken from or inspired by the old Article 31(2) which the words of Section 2 are intended to abrogate and do abrogate. (Para 1968)

Unlike 'compensation' the work 'amount' is not a term of art. It bears no specific legal meaning. The amount fixed by law or determined in accordance with the principles specified by law may be paid partly in cash and partly in kind. The notion of 'the relevancy of principles to compensation' is jettisoned by Section 2 of the 25th Amendment. Obviously, where the law fixes the amount, it cannot be questioned in any court on the ground that it is not adequate, that is, not equal to the value of the property acquired or requisitioned. The legislative choice is conclusive. It would accordingly follow that the amount determined by the principles specified in the law is equally unquestionable in courts. It is not permissible to import in the amended Article 31(2) the notions of 'arbitrary amount' or 'illusory amount' or 'fraudulent amount'. As some amount must be paid, the law may be virtually confiscatory, but not literally confiscatory. It is not permissible to import the notion of reasonableness in Article 31(2) as amended by Section 2. (Paras 1970 and 1971)

The value of the property acquired or requisitioned, the nature of the property acquired or requisitioned, the circumstances in which the property is being acquired or requisitioned and the object of acquisition or requisition will be the guiding principles for legislative determination of amount. The second principle may involve, inter alia, consideration of the income already received by the owner of the property and the social contribution to the value of the property by way of public loans at lower rates of interest, cheap State supply of energy and raw materials, subsidies and various kinds of protection, *etc.* It should be remembered that the value of a property is the resultant of the owner's industry and social contribution. The owner ought not to receive any amount for the value contributed by society. He is entitled to payment for his own contribution. The third principle will include the element of social justice. (Para 1972)

The amended Article 31(2) does not remove the bar of Article 14. (Para 1972)

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Although the amended Article 31(2), according to my construction of it, will abrogate the right of property, it is constitutional as it falls within the scope of the 24th Amendment which I have held to be constitutional. (Para 1972)

Per Chandrachud, J.

The substitution of the neutral expression "amount" for "compensation" still binds the Legislature to give to the owner a sum of money in cash or otherwise. The Legislature may either lay down principles for the determination of the amount or may itself fix the amount. There is, however, intrinsic evidence in Article 31(2) that it does not empower the State to confiscate or expropriate property. The obligation to pay an "amount" does not connote the power not to pay any amount at all. The alternative obligation to evolve principles for determining the amount also shows that there is no choice not to pay. The choice open to the Legislature is that the amount may directly be fixed by and under the law itself or alternatively the law may fix principles in accordance with which the amount will be determined. The amount may, of course, be paid in cash or otherwise. The specific obligation to pay an "amount" and in the alternative the use of the word "principles" for determination of that amount must mean that the amount fixed or determined to be paid cannot be illusory. But this is subject to an important, a very important, qualification. The amount fixed for being paid to the owner is wholly beyond the pale of challenge that it is inadequate. (Paras 2121 to 2123)

The principles evolved for determining the amount cannot be questioned on the ground that by application of those principles the amount determined to be paid is inadequate, in the sense that it bears no reasonable relationship with the market value of the property. Thus the question whether the amount or the principles are within the permissible constitutional limits must be determined without regard to the consideration whether they bear a reasonable relationship with the market value of the property. They may not bear a reasonable relationship and yet they may be valid. But to say that an amount does not bear reasonable relationship with the market value is a different thing from saying that it bears no such relationship at all, none whatsoever. In the latter case the payment becomes illusory and may come within the ambit of permissible challenge. Or if the power of compulsory acquisition or requisition is exercised for a collateral purpose; if the law offends constitutional safeguards other than the one contained in Article 19(1)(*f*); or, if the law is in the nature of a fraud on the Constitution. But if the fixation of an amount is shown to depend upon principles bearing on social good it may not be possible to say that the principles are irrelevant. (Para 2124)

B—Section (2)(b) of 25th Amendment Act, 1971—Validity—Insertion of clause (2-B) in Article 31—Dissociation of Article 19(1)(f) and Article 31(2)—Effect—If changes any essential feature of the Constitution.

Per Sikri, C. J.

The insertion of clause (2-B) in Article 31 is not an unreasonable abridgment of rights under Article 19(1)(*f*). While passing a law fixing principles, the legislatures are bound to provide a procedure for the determination of the amount, and if the procedure is arbitrary that provision may well be struck down under Article 14. (Para 413)

Per Shelat & Grover, JJ.

As regards clause (2-B) inserted in Article 31 which makes Article 19(1)(*f*) inapplicable there is no reason for assuming that a procedure will be provided which will not be reasonable or will be opposed to the rules of natural justice.

Per Hegde & Mukherjea, JJ.

Article 31(2-B) has no real impact on the right conferred under Article 31(2), as there

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

is no antithesis between Article 19(1)(*f*) and Article 31(2). The protection of reasonable procedure before exclusion of Article 19(1)(*f*) is still preserved by rules of natural justice. (Para 709)

Per Ray, J.

Article 19(1)(*f*) is excluded from Article 31(2) in order to make Article 31(2) self-contained. (Para 1025)

F. N. Rana v. *State of Gujarat*, (1964) 5 SCR 294 : AIR 1964 SC 648 and *S. M. Nandi* v. *State of W. B.*, (1971) 1 SCC 688, *referred*.

Per Jaganmohan Reddy, J.

Where the acquisition is for a public purpose, what is sought to be excluded by clause (2-B) is the reasonableness of the procedural provisions by making Article 19(1)(*f*) inapplicable. Since an amendment cannot totally abrogate a fundamental right, it can only be read by the adoption of the doctrine of "severability in application" and, accordingly, clause (2-B) must be held to be restricted only to the abridgment of, as distinct from abrogation, destroying or damaging the right under Article 19(1)(*f*). Moreover, there is nothing in clause (2-B), to prohibit principles of natural justice which are part of the law of the land wherein the rule of law reigns supreme, from being applicable when the liberty of the individual or his property is affected by a law. (Paras 1168 and 1169)

Per Palekar, J.

The new clause (2-B) inserted in Article 31 having the consequence of excluding the application of Article 19(1)(*f*) to a law referred to in clause (2) of Article 31 is merely a re-statement of the law laid down by this Court after the Constitution came into force. (Para 1320)

Sitabati Debi v. *State of West Bengal*, (1967) 2 SCR 949, *relied on*.

Per Khanna, J.

The change made by addition of clause (2-B) in Article 31(2) is permissible under Article 368 and cannot be held to be invalid. (Para 1515)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27 : *Ram Singh* v. *State of Delhi*, 1951 SCR 451 : AIR 1951 SC 270 and *State of Bombay* v. *Bhanji Munji*, (1955) 1 SCR 777 : AIR 1955 SC 41, *referred to*.

Per Chandrachud, J.

As regards Article 31-B, the exclusion of a challenge under Article 19(1)(*f*) in regard to a law passed under Article 31(2) cannot be deemed unconstitutional. (Para 2125)

Newly added clause (2-B) in Article 31 upheld. (Para 2116)

C—Section 3 of 25th Amendment Act, 1971—Validity—Insertion of Article 31-C—Object and effect—Whether an implied amendment—Non-obstante clause—Saving of laws of Article 368 giving effect to Article 39(b) & (c) from Articles14, 19 and 31.

Nature & extent of protection—Validity—Comparison with Article 31-A—Blanket power—Lack of specificity in Article 39(b) & (c)—Whether application of doctrine of nexus possible—Scope of judicial review possible—Whether protects executive action also—Meaning of word 'law' in Article 31-C—Comparison with other articles in the Constitution.

Per Sikri, C. J.

The non-obstante clause in Article 31-C cannot mean that not only fundamental

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

rights like Article 19(1)(*f*) or Article 31 are excluded but all fundamental rights helonging to the minorities and religious groups are also excluded. (Para 417)

Article 31-C cannot be read to be an implied amendment of Article 368. (Para 456)

Mohamed Samsudeen Kariapper v. *S. S. Wijesinha*, 1968 AC 717, 743, *explained*.

Article 31-C unlike Article 31-A lacks specificity and it leaves to each State to adopt measures towards securing the principles specified in clauses (*b*) and (*c*) of Article 39. The wording of Articles 39(*b*) and 39(*c*) is very wide. The expression "economic system" in Article 39(*c*) may well include professional and other services. It would be difficult to resist the contention of the State that each provision in the law has been taken for the purpose of giving effect to the policy of the State. Even if the latter part of Article 31-C is struck down it would be difficult to determine nexus between the impugned law and Article 39(*b*) and Article 39(*c*). There may be no statement of State policy in a law. Even if there is a statement of policy in the Preamble, it would not control the substantive provisions, if unambiguous. But assuming that there is a clear statement it would be for the State Legislature to decide whether a provision would help to secure the objects. The Courts will be unable to separate necessarily incidental provisions and merely incidental. Further, this question is not justiciable if the law contains a declaration that it is for giving effect to such a policy. (Paras 426 and 428)

The petitioner has submitted that Article 31-C has four features of totalitarianism: (1) There is no equality. The ruling party could favour its own party members, (2) there need not be any freedom of speech, (3) there need be no personal liberty which is covered by Article 19(1)(*b*), and (4) the property will be at the mercy of the State. In other words, confiscation of property of an individual would be permissible. By Article 31-C the State Legislature can also abrogate the other freedom of Article 19. It enables a State Legislature to set up complete totalitarianism in the State. (Paras 428 and 430)

Per Shelat & Grover, JJ.

The question of the validity of Article 31-C has to be examined mainly from two points of view; the first is its impact on the various freedoms guaranteed by Article 19, the abrogation of the right of equality guaranteed by Article 14 and the right to property contained in Article 31. The second is whether the amending body under Article 368 could delegate its amending power to the legislatures of the Union and the States. Alternatively, whether the Parliament and the State Legislatures can, under Article 31-C, amend the Constitution without complying with the form and manner laid down in Article 368.

Article 31-C impinges with full force on several fundamental rights which are enabled to be abrogated by the Parliament and the State Legislatures. No cogent or convincing explanation has been given as to why it was necessary to take away all the freedoms guaranteed by Article 19 and for the abrogation of the prized rights, of equality under Article 14 of which has been described as the basic principle of republicanism. (Para 599)

State of Bombay v. *F. N. Balsara*, 1951 SCR 682: AIR 1951 SC 318 and *State of W. B.* v. *Anwar Ali Sarkar*, 1952 SCR 284; AIR 1952 SC 75, *relied on*.

Basheshar Nath v. *C. I. T.*, 1959 Supp. 1 SCR 528 at 551: AIR 1959 SC 149, *referred*.

Also Article 31-C unlike Article 31-A would debar incidental encroachment on rights under Articles 14, 19 & 31. (Para 601)

Since the ambit of Articles 39(*b*) & (*c*) is so wide there would hardly be any law which can be held to have no nexus with it Article 31-C does not give the particular subjects but leaves it to the legislatures to select any topic that may purport to have some nexus with the objectives in Article 39(*b*) & (*c*). In other words, Article 31-C deals with objects with unlimited scope. (Para 602)

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Per Hegde & Mukherjea, JJ.

Clauses (*b*) and (*c*) of Article 39 do not prescribe any subject-matter of legislation. They contain certain objectives to be achieved. The methods to be adopted to achieve those objectives may be numerous. Those clauses cover a very large field of social and economic activities of the Union and the States. (Para 711)

Unlike Article 31-A, Article 31-C is not confined to some particular subjects. It can take in a very wide area of human activities. The power conferred under it is an arbitrary power. It is capable of being used for collateral purposes. It can be used to stifle the freedom given in Article 19. The power conferred under that provision is a blanket power. Even a small majority in a legislature can use that power to truncate or even destroy democracy. That power can be used to weaken the unity and integrity of this country. That Article is wholly out of tune with our Constitution. Its implications are manifold. There is force in the contention of the petitioners that this Article has the potentiality of shaking the very foundation of our Constitution. (Para 717)

Article 31-C has empowered Parliament and the State Legislatures to enact laws *pro tanto* abrogating Articles 14, 19 and 31. A power to take away directly or indirectly a right guaranteed or a duty imposed under a Constitution, by an ordinary law, is a power to *pro tanto* abrogate the Constitution. If the legislature is empowered to amend the Constitution by ordinary legislative procedure, and law enacted by it, even if it does not purport to amend the Constitution, but all the same, is inconsistent with one or more of the provisions of the Constitution it has the effect of abrogating the Constitution to the extent of inconsistency. (Para 718)

McCawley v. *The King*, 1920 AC 691, *relied on.*

Article 31-C permits the State Legislatures and the Parliament to enact Constitution-breaking laws by a simple majority vote of the members present and voting, if the rule regarding quorum is satisfied. Article 31-C proceeds on the basis that the laws enacted under that Article are in conflict with Article 13 and are *prima facie* void. Hence the contention that limitations imposed by Articles 14, 19 and 31 on the legislative power of the Union and the States are lifted to the extent provided in Article 31-C cannot be accepted. (Paras 719 to 721)

As regards similarity of Article 31-C with Article 31-A, it may be noted that encroachment of rights under Articles 14, 19 & 31 by law under Article 31-A must necessarily be incidental. If the encroachment is found to be excessive, the same can be struck down. On the other hand the reach of Article 31-C is very wide. It is possible to fit into the scheme of that Article almost any economic and social legislation. Further, the Court cannot go into the question whether the laws enacted do give effect to the policy set out in Article 39(*b*) and (*c*). (Paras 724 and 726)

Test of nexus of Acts made under Article 31-C with Article 39(*b*) and (*c*) is no protection. There can be few laws which can be held to have no nexus with Article 39(*b*) and (*c*). At any rate, most laws may be given the appearance of aiming to achieve the objectives mentioned in Article 39(*b*) and (*c*). Once that facade is projected, the laws made can proceed to destroy the very foundation of our Constitution. (Para 726)

Proprietary Articles Traders Association v. *A. G. Canada*, 1931 AC 311 at 317, *quoted with approval.*

There is no basis for holding that the Parliament intended that Article 31-C should operate as an amendment of Article 368. (Para 733)

Per Ray, J.

The pre-eminent feature of Article 31-C is that it protects only law. Therefore, any question of violation of Article 31(1) does not arise. Law in Article 31-C must mean statute passed by legislature. (Para 1029)

Part VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

It is true that such law may need details to be filled up by other agencies but the essential elements of Article 31-C must be supplied directly by the enactment. (Para 1030)

Tika Ramji v. *State of U. P.*, 1956 SCR 393: AIR 1956 SC 676, *relied on.*

Article 31-C is inextricably bound up with Article 39(*b*) and (*c*) because the purpose and the phraseology in both the articles are essentially identical. There can be laws within Schedule 7 List III, Entries Nos. 42, 43: List I, Entries Nos. 52 to 54 and List II, Entries Nos. 23, 24, 26 and 27. (Para 1031 and 1032)

The season for excepting Articles 14, 19 and 31 from Article 31-C is the same as in Article 31-A. (Para 1036)

The first and the foremost safeguard is the good sense of the legislature and the innate good sense of the community. The second safeguard is the President's assent. The third safeguard is that in appropriate cases it can be found as to whether there is any nexus between law and Directive Principles sought to be achieved. No sense of irresponsibility can be ascribed or attributed to the representatives of the people. (Para 1036)

Article 31-C creates a legislative field with reference to the object of legislation. It is similar to laws contemplated in Article 15(4), Article 31(5)(*b*)(*ii*) and Article 33. Each of these Articles carves out an exception to some article or articles conferring fundamental rigbts. The fields carved out by the various articles are of different dimensions. The entire process of exception of the legislative field from the operation of some of the articles relating to fundamental rights is the mandate of the Constitution. (Para 1038)

Article 31-C substantially operates in the same manner in the industrial sphere as Article 31-A operates in the agrarian sphere. Article 31-C as an application of the principles underlying Articles 31(4) and 31(6) and Article 31-A to the sphere of industry. (Para 1039)

The exclusion of Article 31 is a necessary corollary to protecting the impugned law from challenge under Articles 14, 19 and 31 because Article 13(2) would but for its exclusion in Article 31-C render such laws void. (Para 1056)

As a result of the 25th Amendment the existing legislative field is freed from the fetters of some provisions of Part III of our Constitution on the legislative power. (Para 1038)

Per Jaganmohan Reddy, J.

Article 31-C has four elements: (*i*) it permits the legislature to make a law giving effect to Article 39(*b*) and Article 39(*c*) *inconsistent* with any of the rights conferred by Articles 14, 19 and 31; (*ii*) it permits the legislature to make a law giving effect to Article 39(*b*) and Article 39(*c*) *taking away* any of the rights conferred by Articles 14, 19 and 31; (*iii*) it permits the legislature to make a law giving effect to Article 39(*b*) and (*c*) *abridging* any of the rights conferred by Articles 14, 19 and 31; and (*iv*) it prohibits calling in question in any Court such a law if it contains a declaration that it is for giving effect to the policy of State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39 on the ground that it does not give effect to such a policy of the State. (Para 1184)

The first element seems to have been added by way of abundant caution, for it takes in the other two elements, namely, taking away and abridging of rights conferred by Articles 14, 19 or 31. However, it would be *ultra vires* the amending power conferred by Article 368, if it comprehends within it the damaging or destruction of these fundamental rights. The second element, namely, *taking away* of these fundamental rights would be *ultra vires* the amending power, for taking away of these fundamental rights is synonymous with destroying them. As for the third element, namely, abridging of these rights, the validity will have to be examined and considered separately in respect of each of these fundamental rights, for an abridgment of the fundamental rights is not the same thing as the damaging of those rights. An abridgment ceases to be an abridgment when it tends to affect the basic or

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

essential content of the right and reduces it to a mere right only in name. In such a case it would amount to the damaging and emasculating the right itself and would be *ultra vires* the power under Article 368. Insofar as Article 31-C authorises or permits abridgment of the rights conferred by Article 19 it would be *intra vires* the amending power under Article 368 as therehy the damaging or emasculating of these rights is not authorised. (Para 1185)

As regards Article 14, though the categories of classification are never closed, and it may be that the ohjectives of Article 39(*b*) and (*c*) may form a basis of classification depending on the nature of the law, the purpose for which it was enacted and the impact which it has on the rights of the citizens, the right to equality before law and equal protection of laws in Article 14 cannot be disembowelled by classification. While Article 39(*b*) and (*c*) can provide for a classification that classfication must have a rational relation to the objectives sought to be achieved by the statute in question. (Paras 1188 and 1189)

The lifting of the embargo of Article 14 on any law made by Parliament or the Legislature of a State under Article 31-C by providing that no law made by these legislative organs to give effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the right conferred therein, would abrogate that right altogether. Parliament cannot under Article 368 abrogate, damage or destroy any of the fundamental rights though it can abridge to an extent where it does not amount to abrogation, damage or destruction. (Para 1189)

In respect of the exclusion of Article 19 by Article 31-C a question whether there can be any justification for imposing more restrictions on such valuable rights as freedom of movement and freedom of speech than what the framers of the Constitution had already provided for in Article 19(2) to (6). The fundamental rights conferred by Article 19(1)(*a*) to (*g*) are not mutually exclusive but they overlap. This consideration must be borne in mind in considering the question why Article 31-C excluded the challenge to the laws protected by Article 31-C under the whole of Article 19, instead of excluding a challenge only under Article 19(1)(*f*) which relates to property; and Article 19(1)(*g*) which relates to business, which would ordinarily require the use of property. (Paras 1194 and 1196)

Article 14 is taken away; Article 19(1)(*a*) to (*g*) is excluded on the ground that each of them have their impact on one or the other of the rights in Part III and since these rights are not mutually exclusive and any property and trade or business affected by legislation under Article 31-C which necessarily must deal with property, if the directives in Article 39(*b*) and (*c*) are to be given effect, will in turn, according to the learned Advocate-General, come into conflict not only with Article 19(1)(*f*) and (*g*) but with the other sub-clauses (*a*) to (*e*) of clause (1) of that article. By this several of the unrelated rights have been abridged by Article 31-C. It makes all the other rights hollow. Now the law under Article 31-C will only operate on "material resources", "concentration of wealth" and "means of production" and if this is so, the rights in Article 19(1)(*a*) to (*e*) would have no relevance and are inapplicable. (Paras 1200 to 1203)

As regards Article 31, the exclusion of Article 31 by Article 31-C, clause (1) of Article 31 is not in fact affected by Article 31-C, because under the latter any rights affected must be by law only. As regards the rest of Article 31, any further abridgment beyond that made by Section 2 of 25th Amendment may amount to destruction or abrogation of that right. (Para 1204)

Article 31-C only contemplates the process of giving primacy to the Directive Principles of State policy over fundamental rights. (Para 1199)

It is then clear that the entire fundamental rights guaranteed to the citizens are *in effect* abrogated. (Para 1200)

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

To say that since Article 31-C is similar to Articles 31-A and 31-B and since the latter were held to be valid in *Sankari Prasad's case*, fundamental rights could be abrogated by an amendment, would not be justified. (Para 1178)

It is not correct to say that just because the validity of Articles 31-A and 31-C was sustained by this Court, though in *Golakhath's case* it may have been on the grounds of expediency, Article 31-C must also on that account be sustained. (Para 1179)

In none of the articles among Articles 33, 15(4) and 16(4) there is a total abrogation of any of the rights as sought to be affected by Article 31-C. The analogy between Articles 15(4) and 16(4) and 31-C is not apt. (Para 1179)

Article 31-C should be considered as lifting the bar of the articles specified therein, and insofar as the subject-matter of the legislation is concerned, though the field is wide, any of the modes to give effect to the directives can only be a mode permissible within the legislative power conferred on the respective legislative organ under the VII Schedule to the Constitution. (Para 1182)

The State has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts have no function in the evaluation of these policies or in determining whether they are good or bad for the community, they have, however, in examining legislative action taken by the State in furthering the ends, to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined. It is, therefore, necessary to keep in view the wide field of Governmental activity enjoined in Article 39(*b*) and (*c*) in determining the reach of the means to achieve the ends and the impact of these means on the Fundamental Rights which Article 31-C affects. (Para 1180)

Per Palekar, J.

In principle, there is no difference in Article 31-A and the new Article 31-C inserted by the 25th Amendment. (Para 1287)

If a law is made with a view to giving effect to the Directive Principles mentioned in Article 39(*b*) and 39(*c*) the law is in conformity with the direct mandate of the Constitution and must be deemed to be constitutional. The effect of the first part of Article 31-C is the same as if, a proviso had been inserted below Article 13(2) or each of the several Articles 14, 19 and 31 excluding its application to the particular type of law mentioned in Article 31-C. (Para 1323)

If the law does not genuinely purport to give effect to the specified Directive Principles it will not be secure against the challenge under Articles 14, 19 and 31. Indeed, since the Directive Principles are couched in general terms they may present some difficulty in judging whether any individual law falls within the ambit of the description given in Article 31-C but such a difficulty is no reason for denying the validity of the amendment. Courts had no difficulty in deciding whether any particular law did fall under Article 31-A or not. (Para 1323)

Per Khanna, J.

But for the difference in subjects, the language of the first clause of Article 31-A and that of the first part of Article 31-C is identical. Both Articles 31-A and 31-C deal with right to property. Article 31-A deals with certain kinds of property and its effect is, broadly speaking, to take those kinds of property from the persons who have rights in the said property. The objective of Article 31-C is to prevent concentration of wealth and means of production and to ensure the distribution of ownership and control of the material resources of the community for the common good. Article 31-C is thus essentially an extension of the principle which was accepted in Article 31-A. If the amendment of the Constitution by which Article 31-A was inserted was valid, there is no ground as to how the Twenty-fifth Amendment relating to the insertion of the first part of Article 31-C can be held to be

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

invalid. This is one of the fittest cases in which the principle of *stare decisis* should be applied. The ground which sustained the validity of clause (1) of Article 31-A, would equally sustain the validity of the first part of Article 31-C. (Para 1518)

Sankari Prasad v. *Union of India*, 1952 SCR 89: AIR 1951 SC 458, *applied.*

Lesses v. *Garnett*, 258 US 130, *relied on.*

The question of legislative competence is still open as in Article 31-A, but in other respects Article 31-C goes much beyond the scope of Articles 31-A and 31-B. (Para 1528)

Per Mathew, J.

I have no doubt that 'law' in Article 31-C can only mean a law passed by Parliament or the State legislatures. The word must take its colour from the context. (Para 1765)

If 24th Amendment which enables Parliament to make an amendment of the Fundamental Rights in such a way as to take away or abridge them is valid, what is there to prevent Parliament from enacting a constitutional amendment making it possible for Parliament or State Legislatures to pass laws for implementing the Directive Principles specified in Article 39(*b*) and 39(*c*) which would be immune from attack on the ground that those laws violate Articles 14, 19 and 31. Article 31-C merely carves out a legislative field with reference to a particular type of law, and exempts that law from the ambit of Article 13(2) in some respects. (Para 1766)

The material portion of Article 31-A is in *pari materia* with the first part of Article 31-C. (Para 1767)

It is a mistake to suppose that every time when Parliament in its legislative capacity or a State Legislature passes such a law and if the law violates the Fundamental Rights under Articles 14, 19 and 31, it is that law which amends the Constitution and makes it valid. The amendment of the relevant provision of the Constitution, namely Article 13(2), has already been made by the 25th Amendment. (Para 1768)

Per Dwivedi, J.

Article 31-C seeks to do, one, its non-obstante clause removes the bar of Article 13(2) against law-making with respect to the principles specified in Article 39(*b*) and (*c*). The bar, however, is not removed in respect of all the fundamental rights. It is removed in respect of the rights in Articles 14, 19 and 31 only. Second, Articles 14, 19 and 31 remain operative as a bar against law-making with respect to all matters other than the principles specified in Article 39(*b*) and (*c*). They are in partial eclipse as regards laws having relevancy to the principles specified in Article 39(*b*) and (*c*). This is the true nature and character of Article 31-C. We should be guided by what it really does and not by how it seems, by its effect and not by its semantic garb. Looked at in this manner, Article 31-C is in the nature of a saving clause to Articles 14, 19 and 31. Instead of being placed at the end of each of these articles, it is placed at one place for the sake of drafting elegance and economy. As a saving clause, Article 31-C saves certain kinds of laws from destruction at the hands of Articles 14, 19 and 31. (Para 1984)

Per Beg, J.

The exclusion of Articles 14 and 19 by a constitutionally valid amendment only carves out or creates a new legislative field by a provision which becomes a part of the Constitution by amendment, so that the constitutional validity of its creation cannot be assailed in any court of law so long as the form and manner prescribed by Article 368 of the Constitution have been observed in making the necessary amendment. Enactments properly falling within this field would be immune from attack for any alleged violations of Articles 14, 19 and 31. (Para 1844)

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Per Chandrachud, J.

Article 31-C has been introduced by the 25th Amendment in order to achieve the purpose set out in Article 39(*b*) and (*c*). (Para 2119)

The true nature and character of Article 31-C is that it identifies a class of legislation and exempts it from the operation of Articles 14, 19 and 31. (Para 2131)

Though Article 31-C is pregnant with possible mischief, it cannot, by the application of any of the well-recognised judicial tests be declared unconstitutional. (Para 2118)

Article 31-C protects only "law" and not an executive action. (Para 2127)

Article 31-C will operate substantially in the same way as Article 31-A operated in the agrarian sphere. In fact Article 31-C is a logical extension of the principles underlying Article 31(1) and (6) and Article 31-A. (Para 2130)

The field of legislation is not created by Article 31-C. The power to legislate exists apart from and independently of it. What the article achieves is to create an immunity against the operation of the specified Fundamental Rights in a pre-existing field of legislation. In principle, there is no distinction between Article 31-C on the one hand and Articles 15(4), 31(4), 31(5)(*b*)(*ii*), and 31(6) on the other. (Para 2131)

Judicial review barred by Declaration that the law is for giving effect to Article 39(b) and (c)—Scope of judicial review in the face of such declaration.

Per Sikri, C. J.

Under this new article once a declaration is given, no court can question the law on the ground that it has nothing to do with giving effect to the policy; whether it gives effect to some other policy is irrelevant. Also a law may contain some provisions dealing with the principles specified in clause (*b*) or (*c*) of Article 39 while other sections may have nothing to do with it, yet on the language it denies any court power or jurisdiction to go into this question. In the face of the declaration, the Supreme Court would be unable to test the validity of incidental provisions which do not constitute an essential and integral part of the policy directed to give effect to Article 39(*b*) and Article 39(*c*). This would prevent the Supreme Court from exercising judicial review as it did in several cases in the past. (Paras 417 and 418)

Akadasi Padhan v. *State of Orissa*, 1963 Supp 2 SCR 691, 707: AIR 1963 SC 1047; *R. C. Cooper* v. *Union of India*, (1970) 1 SCC 248; *Rashbihari Panda* v. *State of Orissa*, (1969) 1 SCC 414; *Vrajlal Manilal & Co.* v. *State of M.P.*, (1969) 2 SCC 248; *Municipal Committee, Amritsar* v. *State of Punjab*, (1969) 1 SCC 475 and *State of Bombay* v. *F. N. Balsara*, 1951 SCR 682: AIR 1951 SC 318, *relied on.*

Per Ray, J.

The nexus or connection between the law and the objectives set out in Article 39(*b*) and (*c*) is a condition precedent for the applicability of Article 31-C. The Court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course. The purpose behind excluding judicial review is to leave legislative policy and wisdom to the legislature. (Paras 1034 and 1035)

The declaration clause is comparable to Section 6(3) of the Land Acquisition Act, 1894 which contains a conclusive evidence clause that declaration shall be conclusive evidence that the land is needed for a public purpose and for a company as the case may be. A conclusive declaration would not be permissible so as to defeat a fundamental right. (Para 1056)

Babu Barkya Thakur v. *State of Bombay*, (1961) 1 SCR 128: AIR 1960 SC 1203 and *Somavanti* v. *State of Punjab*, (1963) 2 SCR 774: AIR 1963 SC 151, *relied on.*

Conclusive proof is defined in the Indian Evidence Act. It is, therefore, seen that the legislative power carries with it the power to provide for conclusive proof so as to oust the

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

jurisdiction of a Court. If a question arises as to whether a piece of legislation with such declaration has a nexus with the Directive Principles in Article 39(*b*) and (*c*) the Court can go into the question for the purpose of process of identification of the legislative measure on a consideration of the scope and object and pith and substance of the legislation. (Para 1057)

Per Palekar, J.

Article 31-C does not prevent judicial review as to whether the law referred to therein is of the description, it maintains, it is. If on a consideration of its true nature and character the court considers that the legislation is not one having a nexus with the principles contained in Article 39(*b*) or (*c*), it will not be saved under Article 31-C. The sole purpose of the declaration, according to the submission, is to remove from the scope of judicial review a question of a political nature. (Paras 1325 and 1236)

It is for the legislature to decide what should go into the law to give effect to its policy towards securing its purpose. The legislature will have to consider the divergent views in the matter and make its own choice as to how it can effectuate its policy. The courts are not concerned with that aspect of the matter and even if a law is considered a failure, courts cannot refuse to give effect to the same. The declaration does no more than forbid such an enquiry by the courts which the courts themselves would not have undertaken. The declaration is only by way of abundant caution. But the court in deciding whether the law falls within the general description given of it in Article 31-C will be competent to examine the true nature and character of the legislation, its design and the primary matter dealt with, its object and scope. If the court comes to the conclusion that the above object of the legislation was merely a pretence and the real object was discrimination or something other than the object specified in Article 39(*b*) and (*c*), Article 31-C would not be attracted and the validity of the statute would have to be tested independently of Article 31-C. (Paras 1328, 1329)

Charles Russell v. *The Queen*, 1882 (VII) Appeal Cases 829 (838-840) and *Attorney-General* v. *Queen Insurance Co.*, 1878(3) Appeal Cases 1090, *relied on.*

Per Khanna, J.

The evil consequences which would flow from the second part of Article 31-C would not, however, be determinative of the matter. Article 31-C departs from the scheme of Article 31-A, because while a judicial review is permissible under Article 31-A to find out as to whether a law has been made for any of the objects mentioned in Article 31-A, such a judicial review has been expressly prohibited under Article 31-C. The result is that even though for the purpose of making an amendment of the Constitution an elaborate procedure is provided in Article 368, power is now given to a simple majority in a State or Central Legislature, in which only the minimum member or members are present to satisfy the requirement of quorum, to make any law in contravention of the provisions of Articles 14, 19 and 31 and make it immune from attack by inserting a declaration in that law. There would, therefore, be an inclination to make an Act immune from attack inserting such a declaration even though only one or two provisions of the Act have a connection with the objects mentioned in Article 39(*b*) and (*c*). Articles 14, 19 and 31 can thus be reduced to a dead letter, an ineffective purposeless showpiece in the Constitution. (Paras 1521 to 1525)

The vice of Article 31-C is that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31-A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31-A has also been done away with under Article 31-C. The effect of the declaration mentioned in Article 31-C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the object mentioned in Article 31-C. The vesting of power of exclusion of judicial review in a legislature including State Legislature, contemplated by Article 31-C, strikes at the basic structure of the Constitution. The second part of Article 31-C thus goes beyond the permissible limit of what constitutes amendment under Article 368. (Paras 1529 and 1531)

Per Mathew, J.

The purpose of Article 31-C is only to give immunity to a law for giving effect to the policy of the State towards securing the Directive Principles under Article 39(*b*) and (*c*) from attack on the ground that its provisions violate Articles 14, 19 and 31. A law which will never give effect to the State policy towards securing these principles will enjoy no immunity, if any of its provisions violates these articles. It is only a law for giving effect to the State policy towards securing the principles specified in Article 39(*b*) and (*c*) that can contain a declaration that it is for giving effect to such a policy and it is only such a declaration that will bar the scrutiny by the Court of the question that the law does not give effect to the policy. The expression 'no law' in the latter part of Article 31-C can only mean that type of law referred to in the first part. To be more specific the expression 'no law' occurring in the latter part of the article can only mean 'no such law' as is referred to in the first part. It is only a law for giving effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39, that can contain a declaration. If a declaration is contained in any law which does not give effect to the policy of the State towards securing the Directive Principles specified in these clauses, the Court can go into the question whether the law gives effect to the said policy. (Para 1778)

In order to decide whether a law gives effect to the policy of the State towards securing the Directive Principles specified in Article 39(*b*) or (*c*), a Court will have to examine the pith and substance, the true nature and character of the law as also its design and the subject-matter dealt with by it together with its object and scope. If a law passed ostensibly to give effect to the policy of the State is, in truth and substance, one for accomplishing an unauthorized object, the Court would be entitled to tear the veil created by the declaration and decide according to the real nature of the law. (Para 1779)

Per Beg, J.

The Attorney-General and the Solicitor-General, appearing for the Union of India, conceded, both in written submissions and in the course of arguments, that the question of relevancy or nexus with the specified principles in Article 39(*b*) and (*c*) would be open to judicial scrutiny in such cases of declaration annexed to laws passed. I think that the concession made on behalf of the Union of India is quite justifiable on a ground which I now proceed to adopt. It is that a declaration by itself is not part of the law made, but it is something only attached to the law even though this annexation is by a purported law. In other words, the declaration, though provided for by law, takes the place of judicial consideration by the Courts and involves consideration of the question whether it is reasonable and necessary to attach such a declaration to a particular law. The declaration annexed to law by itself would not preclude a judicial examination of the nexus so that Courts can still determine whether the law passed is really one covered by the field carved out by Article 31-C or merely pretends to be so protected by parading under cover of the declaration. Both parts of Article 31-C are valid. (Paras 1852, 1854 and 1855)

Per Dwivedi, J.

Under Article 31-C the Court still retains power to determine whether the law has relevancy to the distribution of the ownership and control of the material resources of the community and to the operation of the economic system and concentration of wealth and means of production. If the Court finds that the law has no such relevancy, it will declare the law void if it offends the provisions of Articles 14, 19 and 31. (Paras 1980 and 1981)

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Per Chandrachud, J.

The declaration cannot be utilised as a cloak to protect laws bearing no relationship with the objective mentioned in the two clauses of Article 39. The declaration in Article 31-C does not exclude the jurisdiction of the court to determine whether the law is for giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*). Laws passed under Article 31-C can be upheld only, and only if, there is a direct and reasonable nexus between the law and the Directive Policy of the State expressed in Article 39(*b*) or (*c*). (Paras 2129 and 2133)

Section 3—Proviso—Validity—Delegation of amending power to State Legislatives.

Per Sikri, C. J.

In effect Article 31-C enable States to adopt any policy they like and abrogate Articles 14, 19 and 31 of the Constitution at will. In other words, it enables the State to amend the Constitution. Article 14, for instance, would be limited by the State according to its policy and not the policy of the amending body, i. e. the Parliament, and so would be Articles 19 and 31 while these fundamental rights remain in the Constitution. It is true that the State law would derive authority from Article 31-C but the difference between delegated legislation and the State law made under Article 31-C is this: It is permissible, within limits, for a legislature to delegate its functions, and for the delegate to make law. Further the delegated legislation would be liable to be challenged on the ground of violation of fundamental rights regardless of the validity of the State Act. But a State Legislature cannot be authorised to amend the Constitution and the State law deriving authority from Article 31-C cannot be challenged on the ground that it infringes Articles 14, 19 and 31. (Para 429)

The case of *A. G. for Canada* v. *A. G. for Ontario*, brings out the point that delegation of law-making power can only be to a subordinate body. So it cannot be said that the State Legislatures or Parliament acting in its ordinary legislative capacity, are subordinate bodies to Parliament acting under Article 368 of the Constitution. Therefore it is impermissible for Parliament under Article 368 to delegate its functions of amending the Constitution to either the State legislatures or to its ordinary legislative capacity. (Para 244)

It has been already held that Parliament cannot under Article 368 abrogate fundamental rights. Parliament equally cannot enable State Legislatures to abrogate them. Article 31-C thus enables State Legislatures to abrogate fundamental rights and therefore must be declared unconstitutional. (Para 432)

In such a case the amendment is made not by Parliament as the extent of the amendment is not known till the State legislates. It is when the State legislates that the extent of the abrogation or abridgment of the fundamental rights becomes clear. To all intents and purposes it is State legislation that effects an amendment of the Constitution. (Para 452)

Parliament cannot delegate its essential legislative function. Article 368 does not enable Parliament to delegate its function of amending the Constitution to another body. (Paras 433 and 434)

In re The Delhi Laws Act 1912, 1951 SCR 747 at 984-5: AIR 1951 SC 332; *Raj Narain Singh* v. *Patna Administration,* (1955) 1 SCR 290: AIR 1954 SC 569; *Hari Shankar Bagla* v. *State of Madhya Pradesh,* (1955) 1 SCR 380: AIR 1954 SC 465; *Vasantlal Sanjanwala* v. *State of Bombay,* (1961) 1 SCR 341: AIR 1961 SC 4; *Municipal Corporation of Delhi* v. *Birla Cotton Mills,* (1968) 3 SCR 251: AIR 1968 SC 1232 and *D. S. Garewal* v. *State of Punjab,* 1959 Supp 1 SCR 792: AIR 1959 SC 512, *relied on.*

A legislature cannot create another legislative body. (Para 435)

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

In re Initiative and Referendum Act, 1919 AC 935; *A.G. Nova Scotia* v. *A. G., Canada*, 1951 SCR (Canada) 31; *Hodge* v. *The Queen*, 9 AC 117, *Queen* v. *Burah*, (1878) 3 AC 889, 905: 5 IA 178 and *Nadan* v. *The King*, 1926 AC 482, *referred.*

Delhi Municipality v. *B. C. & W. Mills*, (1968) 3 SCR 251: AIR 1968 SC 1232, 1266, *explained.*

Even in exercise of its amending power the legislature could not "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". Also in Canada the doctrine of limited delegated legislation does not prevail as it does in India. (Para 451)

In re Initiative and Referendum Act, 1919 AC 935, *relied on.*

Per Shelat & Grover, JJ.

As regards the question of delegation of amending power, it is noteworthy that no amendment has been made in Article 368 itself to enable delegation of constituent power. The delegation of such power to the State Legislatures, in particular, involves serious consequences. (Para 600)

It is well-settled that one legislature cannot create another legislative body. (Para 600)

Initiative and Referendum Act, 1919 AC 935 and *A. G. of Nova Scotia* v. *A.G. of Canada*, 1951 Can LR 31, *relied on.*

Article 31-C permits amendment of the Constitution by Parliament and State Legislatures through ordinary laws whereas Article 368 does not contemplate any other mode of amendment or the setting up of another body to amend the Constitution. (Para 601)

Per Hegde & Mukherjea, JJ.

The power conferred on Parliament under Article 368 in its very nature is one that cannot be delegated. It is a special power to be exclusively exercised by Parliament and that in the manner prescribed in Article 368. The State Legislatures are not institutions subordinate to Parliament. Parliament as well as State Legislatures in their respective allocated fields are supreme. Parliament cannot delegate its legislative powers—much less the amending power—to the State Legislatures. (Para 728)

In re The Initiative and Referendum Act, 1919 AC 935 at 945 PC, and *Queen* v. *Burah*, (1878) 5 IA 178 at 194, *relied on.*

Parliament was incompetent to create a new power—a power to ignore some of the provisions of the Constitution—and endow the same on the State Legislatures. This exclusive conferment of amending power on the Parliament is one of the basic features of the Constitution and the same cannot be violated directly or indirectly. Article 31-A made a small dent on this feature and went unnoticed and is now protected by *stare decisis*. The neglect or avoidance of the question in previous cases cannot be accepted as a sound argument. (Para 729)

Queen v. *Kirby*, (1956) 94 CLR 296 and *A. G., Commonwealth of Australia* v. *Queen*, 95 CLR 529 at 547, *relied upon.*

Per Ray, J.

Since modification or exception regarding the application of some of the articles in Part III is achieved by the mandate of the Constitution and not by the law which is to be made by Parliament or State under Article 31-C there is no delegation of amending powers. There is no amendment of any constitutional provision by such law. (Para 1040)

The conclusiveness of declaration introduced by the 25th Amendment in a law under Article 31-C is to be appreciated in the entire context of Article 31-C. In removing restrictions of Part III in respect of a law under Article 31-C there is no delegation of power to any legislature. There is only removal of restriction on legislative power imposed by Articles 14, 19 and 31. Article 31-C does not confer any power to amend the Constitution. (Para 1056)

Per Jaganmohan Reddy, J.

It is not necessary in the view I am taking to consider the question whether Article 31-C delegates the power of amendment to the State Legislatures and Parliament or that it does not indicate the subject-matter of legislation as in Article 31-A but merely purports to enable the legislative organs to choose the subject-matter from a field which, as I said, is as wide and indeterminate as the term 'operation of the economic system' would denote. (Para 1182)

Per Khanna, J.

The power of amendment being of vital importance it can neither be delegated nor can those vested with the authority to amend abdicate that power in favour of another body. Further, once such a power is granted, either directly or in effect, by a constitutional amendment to the State Legislatures, it would be difficult to take away that power, because it can be done only by means of a constitutional amendment and the States would be most reluctant, having got such a power, to part with it. Article 31-C has, in effect, delegated or granted the power of making amendment in important respects to a State Legislature. It should be impermissible in the face of Article 368 in its present form under our Constitution, for the amending authority to vest its amending power in another authority like a State Legislature. It has to be emphasised in this context that according to Article 368, an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament. The word "only" has a significance and shows that as long as Article 368 exists in its present form, the other methods of amendment are ruled out. (Para 1527)

Per Mathew, J.

It is a bit difficult to understand how Article 31-C has delegated or invested the Parliament in its legislative capacity or the State Legislatures, with any power to amend the Constitution. Parliament in its legislative capacity or the State Legislatures cannot confer any immunity upon the laws passed by them from the attack and they do not do so. They rely upon the 25th Amendment as conferring the immunity upon the law which gives effect to the State Policy towards securing the purpose in Article 39(b) and (c). (Paras 1768 and 1769)

Per Beg, J.

There can be no question of delegation of the power of amendment if the Constitution is held to be the principal and the source of all constitutionally valid power and authority in the eye of law. The principle *delegatus non potest delegare* is only applicable against a delegate but not against the principal. (Para 1843)

Per Dwivedi, J.

Under Article 31-C there is no delegation of the constituent power. (Paras 1985 and 1986)

Harishanker Bagla v. *State of M.P.*, (1955)1 SCR 380 : AIR 1954 SC 465, *applied.*

Per Chandrachud, J.

Article 31-C does not delegate the power to amend. (Para 2132)

Conclusions regarding validity of Art. 31-C and of Twenty-fifth Amendment Act, 1971—Doctrine of severability if applicable—Change of essential features if involved.

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

Per Sikri, C. J.

The conclusion is that Article 368 does not enable Parliament to constitute another legislature to amend Article 368 itself. So Section 3 of the Constitution (Twenty-fifth) Amendment Act, 1971, is void as it delegates power to legislatures to amend the Constitution. (Paras 456 and 457)

Per Shelat & Grover, JJ.

Article 31-C suffers from two kinds of vices which seriously affect its validity. The first is that it enables total abrogation of fundamental rights contained in Articles 14, 19 and 31, and, secondly, the power of amendment contained in Article 368 is of special nature which has been exclusively conferred on the Parliament and can be exercised only in the manner laid down in that Article. It was never intended that the same could be delegated to any other legislature including the State Legislatures. (Para 604)

Per Hegde & Mukherjea, JJ.

Article 31-C permits the destruction of some of the basic features of our Constitution and consequently, it is void. (Para 735)

Per Ray, J.

Article 31-C has been validly introduced. The 25th Amendment is valid. (Para 1057)

Per Jaganmohan Reddy, J.

The impugned Article 31-C enables Parliament and the State Legislatures to make laws unfettered by Articles 14, 19 and 31 in respect of the wide and undefined field of objectives indicated in Articles 39(*b*) & (*c*). All these objectives before the amendment had to be achieved by the exercise of the legislative power enumerated in VII Schedule which would ordinarily be exercised within the limitations imposed by the Constitution and the fundamental rights. The amendment removes these limitations, though the law made must still be within the legislative power conferred under the VII Schedule, and enables Parliament and the State Legislatures, subject to one-tenth quorum of its members present and by a simple majority, to enact laws which contravene the fundamental rights conferred under Articles 14, 19 and 31 and which Parliament by complying with the form and manner provided under Article 368, could alone have effected. (Para 1181)

Article 31-C may be held to be intra vires the amending power only if those portions of the Article which make it ultra vires the amending power are severed from the rest of it. The portions that may have to be severed are the words, "is inconsistent with or takes away, or" and the words "Article 14" and the part dealing with the declaration by reason of which judicial review is excluded. I have considered the validity of Article 31-C by applying the doctrine of severability. (Paras 1206 and 1210)

In a case of constitutional amendment which has been enacted after following the form and manner prescribed in Article 368, it should not be held invalid, if it could be upheld even by severing the objectionable part, where the valid part can stand on its own. Happily, even if I am alone in this view, the portions indicated by me are severable, leaving the unsevered portion operative and effective so as to enable laws made under Article 31-C to further the directives of State policy enshrined in Article 29(*b*) and (*c*). In the result, the construction of Article 31-C after severing the portions indicated above, I hold Section 3 of the Twenty-fifth Amendment valid. (Para 1210)

Per Palekar, J.

On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations

PART VI—Constitution (Twenty-fifth) Amendment Act, 1971 (*contd.*)

express or implied on the amending power, it must be conceded that all the Amendments which are in question here must be deemed to be valid. (Para 1318)

The Twenty-fifth Amendment Act is, therefore, valid. (Para 1331)

Per Khanna, J.

The second part of Article 31-C is liable to be quashed on the following grounds:

(1) It gives a *carte blanche* to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.

(2) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. (Para 1535-A)

Per Mathew, J.

The 25th Amendment including Article 31-C is valid. (Paras 1780 and 1787)

Per Beg, J.

Since 24th Amendment is valid, 25th Amendment is also valid. I agree with Ray, Palekar, Mathew and Dwivedi, JJ. (Para 1851)

Per Dwivedi, J.

The 25th Amendment is valid in its entirety. (Para 1995)

Per Chandrachud, J.

Twenty-fifth Amendment Section 2; held valid. (Para 2115)

Section 3 of the Twenty-fifth Amendment, which introduces Article 31-C, is valid. (Para 2134)

PART VII—CONSTITUTION (TWENTY-NINTH) AMENDMENT ACT, 1972

Constitutional validity of 29th Amendment—Inclusion of the Kerala Acts (Acts 33 of 1969 & 25 of 1971) in the Ninth Schedule—Whether the Acts should be governed by Article 31-A to gain protection of Article 31-B—Article 31-B if governed by Article 31-A—Whether inclusion of these two Acts affects any basic and essential feature of the Constitution.

Per Sikri, C. J.

Article 31-B is not limited by Article 31-A.

PART VII—Constitution (Twenty-ninth) Amendment Act, 1972 (*contd.*)

State of Bihar v. *Sir Kameshwar Singh*, 1952 SCR 889, 914-15: AIR 1952 SC 252; *Sibnath Banerji's case*, 1945 FCR 195: AIR 1945 PC 156, *referred.*

Visweshwar Rao v. *State of M.P.*, 1952 SCR 1020, 1037: AIR 1952 SC 252, 296 and *N.B. Jeejeebhoy* v. *Assistant Collector Thana*, (1965) 1 SCR 636, 648: AIR 1965 SC 1096, *relied on.*

It has been held that Article 368 does not enable Parliament to abrogate or take away fundamental rights. If this is so, it does not enable Parliament to do this by any means, including the device of Article 31-B and the Ninth Schedule. This device of Article 31-B and the Ninth Schedule is bad in so far as it protects statutes even if they take away fundamental rights. Therefore, it is necessary to declare that the twenty-ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights. In this regard it cannot be argued that the device of Article 31-B and the Ninth Schedule has uptil now been upheld by this Court and it is now too late to impeach it. This point has been raised for the first time and time alone would not validate an Act which when challenged is found to be ultra vires. (Paras 469, 470)

Proprietary Articles Trade Association v. *A.G. for Canada*, (1931) AC 310, 317 and *A.G. for Australia* v. *The Queen and the Boilermakers Society of Australia*, (1957) AC 288, 323, *relied on.*

Since arguments were not addressed on the merits of individual cases, it would be for the Constitution Bench to decide whether the impugned Acts take away fundamental rights. If they do, they will have to be struck down. If they only abridge fundamental rights, it would be for the Constitution Bench to determine whether they are reasonable abridgments essential in the public interest. (Para 472)

Per Shelat & Grover, JJ.

The petitioner urged that as regards inclusion of the two Kerala Acts by 29th Amendment, it is to be borne in mind that Article 31-B is intimately linked with Article 31-A and, therefore, only those legislative enactments which fall under Article 31-A can be included in the IXth Schedule under Article 31-B. But this matter which has been settled for all these years cannot be re-opened now. It will still be open, however, to the Court to decide whether the Acts which were included in the Ninth Schedule by 29th Amendment Act or any provision thereof abrogates any of the basic elements of the constitutional structure or denudes them of their identity. So the 29th Amendment is valid. However, the question whether the Acts included in the Ninth Schedule by that amendment or any provision of those Acts abrogates any of the basic elements of the constitutional structure or denudes them of their identity will have to be examined when the validity of those Acts comes up for consideration. (Paras 607 and 608)

Per Hegde & Mukherjea, JJ.

Article 31-B is independent of Article 31-A. It is too late in the day to reopen that question. Whether the Acts which were brought into the IXth Schedule by the 29th Amendment Act or any provision in any of them abrogate any of the basic elements or essential features of the Constitution can be examined when the validity of those Acts is gone into.

We reject the contention of the petitioners that before an Act can be included in the IXth Schedule, it must satisfy the requirements of Article 31-A. (Paras 742 and 743)

Per Ray, J.

The pattern of Articles 31-A, 31-B, the Ninth Schedule and Article 31-C is best understood by the observations of Patanjali Sastri, C.J., in *Sankari Prasad case* and of Wanchoo, J., in *Golak Nath case.* (Para 1055)

There is nothing in Article 31-B to indicate that it is linked with the same subject-matter as Article 31-A. Article 31-B need not relate to any particular type of legislation

PART VII—Constitution (Twenty-ninth) Amendment Act, 1972 (*contd.*)

Article 31-B gives a mandate and complete protection from the challenge of fundamental rights to the Scheduled Acts and the Regulations. (Paras 1058 and 1061)

The validity of the Constitution 29th Amendment Act lies within a narrow compass. Article 31-B has been held by this Court to be a valid amendment. Article 31-B has also been held by this Court to be an independent provision. Article 31-B has no connection with Article 31-A. The *Bihar Land Reforms case* and *Jeejeebhoy case* are well-settled authorities for that proposition. It, therefore, follows that the contention on behalf of the petitioner cannot be accepted that before the Acts can be included in the Ninth Schedule requirements of Article 31-A are to be complied with. (Para 1062)

Per Jaganmohan Reddy, J.

Notwithstanding the 29th amendment the Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them and whether they effect reasonable abridgments in public interest, and if they take away, they will have to be struck down. The question whether fundamental rights are abrogated or emasculated by any of the Acts or provisions of these Acts included by the impugned Amendment, will be open for examination when the validity of these Acts is gone into, and subject to this reservation, I hold the Constitution (Twenty-ninth) Amendment valid. (Para 1211)

Per Palekar, J.

By the Twenty-ninth Amendment, the two Kerala Acts challenged in this petition were included in the Ninth Schedule. Like other Acts included in that Schedule they are immune from challenge by reason of the protection given to the Schedule by Article 31-B. The Twenty-ninth Amendment is not different from several similar Amendments made previously by which Statutes were added from time to time to the Ninth Schedule and whose validity has been upheld by this court. The Twenty-ninth Amendment is, therefore, valid. (Para 1332)

Per Khanna, J.

In have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act.

Per Mathew, J.

I have no doubt in my mind as regards the validity of the 29th Amendment. For the reasons given in the judgment of my learned brother Ray, J., I hold that the 29th Amendment in valid. (Para 1782)

Per Beg, J.

Since 24th is valid, 29th is also valid. I agree with Ray, Mathew, Palekar, Dwivedi, JJ. (Para 1851)

Per Dwivedi, J.

It is not necessary that law to be included in Ninth Schedule should be connected with agrarian reform, 29th Amendment is valid. (Paras 1992 and 1994)

Per Chandrachud, J.

If every Act in the Ninth Schedule has to be covered by Article 31-A, Article 31-B would become redundant. Article 31-B was, therefore, held not to be governed by Article 31-A. The Twenty-Ninth Amendment must, accordingly, be held to be valid. (Para 2136)

SCC Online Academic Edition

PART VIII—MISCELLANEOUS

A—Article 368 Proviso—If indicates the essential or the federal features of the Constitution—Non-inclusion of Article 52—Effect—Non-inclusion of Part III whether indicates its non-amendibility.

Per Sikri, C.J.

Analysis of the provisions contained in clauses (*a*) and (*b*) of the proviso to Article 368 shows that the reason for including certain articles and excluding certain other from the proviso was not that all articles dealing with the federal structure or the status of the States had been selected for inclusion in the proviso. The provisions of sub-clauses (*c*), (*d*) and (*e*) can rightly be said to involve the federal structure and the rights of States. (Paras 53 and 54)

The Constitution-makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India. In other words they did not contemplate a monarchy being set up in India or there being no President. (Para 50)

Per Shelat and Grover, JJ.

The provisions contained in clauses (*a*) and (*b*) of the proviso of Article 368 do not throw any light on the logic, sequence or systematic arrangement in respect of the inclusion of those Articles which deal with the whole of the federal structure. These clauses demonstrate that the reason for including certain Articles and excluding others from the proviso was not that all Articles dealing with the federal structure or the States had been selected for inclusion in the proviso. The other unusual result is that if the fundamental rights contained in Part III have to be amended that can be done without complying with the provisions of the proviso It is difficult to understand that the Constitution-makers should not have thought of ratification by the States if such important and material rights were to be abrogated or taken away wholly or partially. (Para 497)

Per Khanna, J.

Non-inclusion of Part III in the proviso to Article 368 requiring ratification by State does not support its non-amendibility. The decision is not of importance. The proviso includes such articles as affect the interest of the States and federal structure. (Para 1443)

Per Mathew, J.

The purpose of the proviso to Article 368 was that the rights, powers and privileges of the States or their status as States should not be taken away or impaired without their participation to some extent in the amending process. (Para 1593)

B—Indian Independence Act, 1947—Sections 6(6) & 8(1)—Power and authority of the Constituent Assembly to frame the Constitution—Power of Constituent Assembly to limit the amending power of future Parliaments—Whether Constituent Assembly represented the people—Whether it was vested with legal sovereignty—What makes the Constitution binding.

Per Sikri, C. J.

Provisions of Sections 6(6) & 8(1) of the Indian Independence Act, 1947 amply demonstrate that when the Constituent Assembly started functioning, it knew, if it acted under the Indian Independence Act, that it could limit the powers of the future Dominion Parliaments. (Para 166)

No similar provisions exist in any of the Independence Acts in respect of other countries. (Para 167)

PART VIII—Miscellaneous (*contd.*)

Per Shelat and Grover, JJ.

It was by virtue of Section 8 of the Indian Independence Act, 1947 that the Constituent Assembly was vested with the legal authority to frame a Constitution for India. (Para 484)

Per Jaganmohan Reddy, J.

The Indian Independence Act, 1947, Sections 6 and 8 conferred on the Constituent Assembly the power to enact a Constitution, as well as the full powers to make laws which were not to be void or inoperative on the ground that they are repugnant to the laws of England, or to the provisions of the Indian Independence Act or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act. (Para 1115)

The fact that the Preamble professed in unambiguous terms that it is the people of India who have adopted, enacted and "given to themselves this Constitution"; that the Constitution is being acted upon unquestioned for the last over twenty-three years and every power and authority is purported to be exercised under the Constitution; and that the vast majority of the people have, acting under the Constitution, elected their representatives to Parliament and the State Legislatures in five general elections, makes the proposition indisputable that the source and the binding force of the Constitution is the sovereign will of the people of India. (Para 1119)

Per Khanna, J.

The Constituent Assembly framed and adopted the Constitution not on the basis of any power derived from Section 6 of the Indian Independence Act. On the contrary, the members of the Constituent Assembly framed and adopted the Constitution as the representatives of the people and on behalf of the people of India. (Para 1485)

I find it difficult to restrict the scope of Article 368 because of anything said in Section 6 of the Indian Independence Act. (Para 1486)

Per Mathew, J.

The Constituent Assembly derived its legal competence to frame the Constitution from Section 8(1) of the Indian Independence Act, 1947. The British Parliament, by virtue of its legal sovereignty over India, passed the said enactment and invested the Assembly with power to frame the Constitution. Whatever might be the constitutional result flowing from the doctrine that sovereignty is inalienable and that the Indian Independence Act itself could have been repealed by Parliament, independence, once granted, cannot be revoked by an erstwhile sovereign; at any rate, such revocation will not be recognised by the Courts of the country to which independence was granted. What makes a transfer of sovereignty binding is simply the possession on the part of the transferee of power and force sufficient to prevent the transferor from regaining it. (Para 1603)

It does not follow that because the people of India did not frame the Constitution or ratified it, the Constitution has no legal validity. The validity of a constitution is one thing; the source from which it proceeds is a different one. Apart from its legal validity derived from the Indian Independence Act, its norms have become efficacious and a Court which is a creature of the Constitution will not entertain a plea of its invalidity. (Para 1604)

Per Beg, J.

Constituent Assembly was conferred the legal power and authority, by Section 8 of the Indian Independence Act, passed by the British Parliament, to frame our Constitution. Whether we like it or not, Sections 6 and 8 of an Act of the British Parliament transferred, in the eye of law, the legal sovereignty, which was previously vested in the British Parliament, to the Indian Parliament which was given the powers of a Constituent Assembly for framing our Constitution. The vesting of the power of making the Constitution was, however, legally in the Constituent Assembly thus constituted and recognised and not in "the people of India", in whose name the Constituent Assembly no doubt spoke in the Preamble to the Constitution. The Constituent Assembly thus spoke for the whole of India without any specific or direct legal authority conferred by the people themselves to perform this function. (Paras 1798 and 1799)

The legal sovereignty was vested in the Constituent Assembly whereas the people of India may be said to be only politically "sovereign". (Para 1810)

C—Golak Nath Case—Ratio of the case—Whether needs to be overruled—Whether rendered academic.

Per Sikri, C. J.

The question whether *Golak Nath's case* was rightly decided or not does not matter because the real issue is different and of much greater importance. (Para 10)

In *Golak Nath case* the conclusions were given in the light of the Constitution as it stood then, i. e. while Article 13(2) subsisted in the Constitution. It was then not necessary to decide the ambit of Article 368 with respect to the powers of Parliament to amend Article 13(2)or to amend Article 368 itself. (Para 35)

Further the Chief Justice refused to express an opinion on the contention that, in exercise of the power of amendment, Parliament cannot destroy the fundamental structure of the Constitution but can only modify the provision thereof within the frame-work of the original instrument for its better effectuation. (Para 36)

Per Shelat & Grover, JJ.

The decision in *Golak Nath case* has become academic, for even if it be assumed that the majority judgment that the word 'law' in Article 13(2) covered constitutional amendments was not correct, the result on the questions, wider than those raised in *Golak Nath case*, now raised before us would be just the same.

Per Jaganmohan Reddy, J.

The ratio of *Golak Nath case* is that an amendment under Article 368 is a 'law' within the meaning of Article 13(2). What the leading majority judgment in that case did not decide, however, is whether Article 368 itself could be amended under the proviso of that article conferring a power to amend the whole Constitution. *Golak Nath case* is not determinative of the question now raised before this Court as to whether the power to amend Article 368 could be exercised to amend the fundamental rights in Part III. At any rate, five of the six Judges who expressed an opinion on this aspect support the proposition that tbis can be done. The observations in the majority judgments of Subba Rao, C. J., and Hidayatullah, J., as he then was, about the future exercise of that power are clearly *obiter*. No ratio can be found in *Golak Nath case* for the majority declaring that Parliament in future cannot amend fundamental rights which is binding on this Court nor can it amend the amending article to take away or abridge fundamental rights. (Paras 1073 and 1074)

Per Chandrachud, J.

The conclusions of *Golak Nath case* were incorrect. (Para 2142)

D—Supreme Court—Practice and procedure—Whether decisions can be based on concession made by counsel before the Supreme Court.

Per Khanna, J.

Matters relating to construction of an article of the Constitution or the constitutional validity of an impugned provision have to be decided in the light of the relevant provisions and a concession made by the State counsel or the opposite counsel would not absolve the court from determining the matter independently of the concession. A counsel may sometimes make a concession in order to secure favourable verdict on another important point; such a concession would, however, not be binding upon another counsel. It is well-settled that admission or concession made on a point of law by the counsel is not binding upon the party represented by the counsel, far less would such admission or concession preclude other parties from showing that the concession was erroneous and not justified in law. It may, therefore, be laid down as a broad proposition that constitutional matters cannot be disposed of in terms of agreement or compromise between the parties, nor can the decision in such disputes in order to be binding upon others be based upon a concession even though the concession emanates from the State counsel. The concession has to be made good and justified in the light of the relevant provisions. (Para 1532)

E—Article 19—Test of Due Process of Law and Test of Reasonableness under Article 19—If distinct.

Per Mathew, J.

The concept of "due process" enters into the meaning of reasonableness of restrictions in clauses 2 to 6 of Article 19.

I am unable to understand how the word 'reasonable' is more definite than the words 'due process'. As the concept of 'due process' draws its nourishment from natural or higher law so also the concepts of 'reason' and 'reasonableness' draw the juice for their life from the law of reason, which for the common law lawyer is nothing but natural law. (Para 1695)

F—Articles 29 & 30—Whether rights of minorities can be abrogated

Per Sikri, C J.

The inclusion of special rights for minorities has great significance. They were clearly intended to be inalienable. (Para 128)

In the context of the British Plan, the setting up of Minorities sub-committee, the Advisory Committee and the Proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities. (Para 178)

G—Article 31-B—Object—Whether to prevent time-consuming litigation to prove the validity of laws otherwise valid.

Per Sikri, C J.

The alleged object of Article 31-B that it was to prevent time-consuming litigation to prove the validity of an enactment is unconvincing. (Para 474)

Advocates who appeared in this case :

N. A. Palkhivala, C. K. Daphtary, M. C. Chagla, Soli Sorabji, Anil B. Divan and *K. T. Haridranath*, Senior Advocates, (*J. B. Dadachanji, B. G. Murdeshwar, Anwarulla Pasha, Ravinder Narain, O. C. Mathur, S. Swarup* and *S. I. Thakore*, Advocates, with them)	for Petitioner (in W. P. No. 135/70).
H. M. Seervai, Advocate-General for the State of Maharashtra and *M. M. Abdul Khadar*, Advocate-General for the State of Kerala, (*T.R. Andhyarujina* and *K.M.K. Nair*, Advocates, with them)	for Respondent No. 1 (in W. P. No. 135/70).
Niren De, Attorney-General of India and *Lal Narain Sinha*, Solicitor-General of India, (*R. N. Sachthey, Ram Panjwani* and *Miss Sumitra Chakravarty*, Advocates, with them)	for Respondent No. 2 (in W. P. No. 135/70).

P. Ramachandra Reddy, Advocate-General for the State of Andhra Pradesh, (*T.V.S. Narasimhachari* and *P. Parameshwara Rao*, Advocates, with him)	for Advocate-General, State of Andhra Pradesh (in W. P. No. 135/70).
Dr. J. C. Medhi, Advocate-General for the State of Assam and *Moinul Haque Chowdhury*, Senior Advocate, (*Naunit Lal* Advocate, with them)	for Advocate-General, State of Assam (in W. P. No. 135/70).
Balbhadra Prasad Singh, Advocate-General for the State of Bihar (*U. P. Singh*, Advocate, with him)	for Advocate-General, State of Bihar (in W. P. No. 135/70).
Y. S. Dharmadhikari, Advocate-General and *J. P. Bajpai*, Dy. Advocate	for Advocate-General, State of J. & K. (in W. P. 135/70).
Y. S. Dharmadhikari, Advocate-General and *J. P. Bajpai*, Dy. Advocate-General for the State of Madhya Pradesh, (*I. N. Shroff*, Advocate, with them)	for Advocate-General, State of Madhya Pradesh (in W. P. 135/70).
H. M. Seervai, Advocate-General for the State of Maharashtra, (*T. R. Andhyarujina* and *S. P. Nayar*, Advocates, with him)	for Advocate-General, State of Maharashtra (in W. P. 135/70).
R. N. Sachthey and *S. K. Nandy*, Advocates	for Advocate-General, State of Manipur (in W. P. 135/70).
Nirendra Mohan Lahiri, Advocate-General for the State of Meghalaya, (*D. N. Mukherjee*, Advocate, with him)	for Advocate-General, State of Meghalaya (in W. P. 135/70).
R. N. Byra Reddy, Advocate-General, State of Mysore, (*Chandra Kant Urs*, Govt. Advocate, Mysore and *M. Veerappa*, Advocate, with him)	for Advocate-General, State of Mysore (in W. P. No. 135/70).
S. K. Ghose, Advocate-General, State of Nagaland, (*Naunit Lal*, *H. K. Sema* and *A. R. Barthakar*, Advocates, with him)	for Advocate-General, State of Nagaland (in W. P. No. 135/70).
Gangadhar Rath, Advocate-General, State of Orissa, (*Gobind Das* and *B. Parthasarathy*, Advocates, with him)	for Advocate-General, State of Orissa (in W. P. No. 135/70).
R. N. Sachthey, Advocate	for Advocate-General, State of Punjab (in W. P. No. 135/70).
Dr. L. M. Singhvi, Advocate-General, State of Rajasthan, (*K. Baldev Mehta* and *Sobhagmal Jain*, Advocates with him)	for Advocate-General, State of Rajasthan (in W. P. No. 135/70).

SCC Online Web Edition Academic

S. Govind Swaminatha, Advocate-General, State of Tamil Nadu, (*V. Rangam, N. S. Siram* and *Miss A. Subashini*, Advocates, with him)	for Advocate-General, State of Tamil Nadu (in W. P. No. 135/70).
S. N. Kakkar, Advocate-General, State of Uttar Pradesh, (*O. P. Rana*, Advocate, with him)	for Advocate-General, State of Uttar Pradesh (in W. P. No. 135/70).
Binayak Banerjee, Senior Advocate, (*Somen Bose, Suprakash Banerjee* and *G. S. Chatterjee*, Advocates, with him)	for Intervener No. 1 (in W. P. No. 135/70).
G. B. Raikar, S. S. Javali, R. L. Roshan and *H. K. Puri*, Advocates	for Intervener Nos. 2 and 3 (in W. P. No. 135/70).
D. M. Parulekar, C. K. Ratnaparkhi and *A. G. Ratnaparkhi*, Advocates	for Intervener Nos. 4 to 6 (in W. P. No. 351/72).
Mahindra Nath Ghosh, Senior Advocate, (*Sommen Bose, Sohendra Sekhar Roy* and *G. S. Chatterjee*, Advocates, with him)	for Intervener Nos. 7 and 8 (in W. P. No. 135/70).
Miss Lily Thomas, Advocate	for Intervener No. 20 (in W. P. No. 135/70).
Anil Diwan, Senior Advocate, (*J. B. Dadachanji, S. I. Thakore, P. M. Dandekar, D. M. Popat, M. L. Bhakta, Ravinder Narain* and *O. C. Mathur*, Advocates)	for Intervener No. 9 (in W. P. Nos. 135/70 and 373/72).
N. A. Palkhivala and *Basudeo Prasad*, Senior Advocates (*J. B. Dadachanji, S. I. Thakore, P. M. Dandekar, D. M. Popat, M. L. Bhakta, Ravinder Narain, O. C. Mathur* and *S. Swarup*, Advocates, with them)	for Intervener No. 10 (in W. P. Nos. 135/70 and 373/72).
N. A. Palkhivala and *Anil Diwan*, Senior Advocates, (*S. I. Thakore, P. M. Dandekar, D. M. Popat, M. L. Bhakta, J. B. Dadachanji, Ravinder Narain, O. C. Mathur* and *S. Swarup*, Advocates, with them)	for Intervener Nos. 11 to 19 (in W.P. Nos. 135/70 and 373/72).
N. A. Palkhivala, M. C. Chagla and *Soli Sorabji*, Senior Advocates, (*B. G. Murdeshwar, J. B. Dadachanji, Ravinder Narain, O. C. Mathur, S. Swarup* and *A. G. Meneses*, Advocates, with them)	for Petitioner (in W. P. No. 351/70).
Soli Sorabji, Senior Advocate (*B. G. Murdeshwar, J. B. Dadachanji, Ravinder Narain, O. C. Mathur, S. Swarup* and *A. G. Meneses*, Advocates, with him)	for Petitioner (in W. P. No. 352/72).
Niren De, Attorney-General of India and *Lal Narain Sinha*, Solicitor-General of India and *D. P. Singh*, Senior Advocate, (*G. L. Sanghi, R. N. Sachthey* and *B. D. Sharma*, Advocates, with them)	for Respondent No. 1 (in W. P. No. 351/72).
P. Ramachandra Reddy, Advocate-General, State of Andhra Pradesh, *G. Narayana Rao* and *P. Parameshwara Rao*, Advocates, with him)	for Advocate-General, State of Andhra Pradesh (in W.P. Nos. 351-352/72).

Balbhadra Prasad Singh, Advocate-General, State of Bihar, (*Radha Raman*, *Jai Narayan* and *U. P. Singh*, Advocates, with him)	for Advocate-General, State of Bihar, (in W. P. Nos. 351-352/72).
N. Ibotombi Singh, Advocate-General, State of Manipur, (*S. K. Nandy* and *R. N. Sachthey*, Advocates, with him)	for Advocate-General, State of Manipur, (in W. P. Nos. 351-352/72).
Gangadhar Rath, Advocate-General, State of Orissa, (*G. S. Chatterjee*, Advocate, with him)	for Advocate-General, State of Orissa (in W. P. Nos. 351-352/72).
R. N. Sachthey, Advocate	for Advocate-General, State of Punjab, (in W. P. Nos. 351-352/72).
Intervener appeared in person and later *Basudev Prasad*, Senior Advocate, (*N. N. Sharma*, Advocate, with him)	for Intervener No. 1 (in W. P. No. 351/72).
Santok Singh and *V. Mayakrishnan*, Advocates	for Intervener No. 2 (in W. P. No. 351/72).
C. K. Daphtary, Senior Advocate, (*R. N. Banerjee*, *J. B. Dadachanji*, *Ravinder Narain*, *O. C. Mathur*, *P. C. Bhartari* and *S. Swarup*, Advocates, with him)	for Petitioner (in W. P. No. 373/72).
M. C. Chagla and *C. K. Daphtary*, Senior Advocates, (*R. N. Banerjee*, *J. B. Dadachanji*, *Ravinder Narain*, *O. C. Mathur*, *P. C. Bhartari*, *S. Swarup* and *N. A. Palkhivala*, Advocates, with them)	for Petitioner (in W. P. No. 374/72).
Niren De, Attorney-General of India, *Lal Narain Sinha*, Solicitor-General of India and *M. K. Ramamurthy*, Senior Advocate, (*R. N. Sachthey*, Advocate, with them)	for Respondent No. 1 (in W. P. No. 373/72).
Niren De, Attorney-General of India and *Lal Narain Sinha*, Solicitor-General of India, (*R. H. Dhebar*, *R. N. Sachthey* and *B. D. Sharma*, Advocates, with them)	for Respondent No. 1 (in W. P. No. 374/72).
N. A. Palkhivala and *C. K. Daphtary*, Senior Advocates, (*R. N. Banerjee*, *J. B. Dadachanji*, *Ravinder Narain*, *O. C. Mathur*. *P. C. Bhartari* and *S. Swarup*, Advocates, with them)	for Petitioner (in W. P. No. 400/72).
Niren De, Attorney-General of India and *Lal Narain Sinha*, Solicitor-General of India, (*R. N. Sachthey*, *S. P. Nayar* and *S. N. Prasad*, Advocates, with them)	for Respondent No. 1 (in W. P. No. 400/72).

The following Judgments of the Court were delivered by

Sikri, C. J.—I propose to divide my judgement into eight parts. Part I will deal with Introduction; Part II with interpretation of Golak Nath's case; Part III with the interpretation of the original Article 368, as it existed prior to its amendment; Part IV with the validity of the Constitution (Twenty-fourth Amendment) Act; Part V with the validity of Section 2 of the Constitution (Twenty-fifth Amendment) Act; Part VI with the validity of Section 3 of the Constitution (Twenty-fifth Amendment) Act; Part VII with Constitution (Twenty-ninth Amendment) Act; and Part VIII with conclusions.

Part I—Introduction

2. All the six writ petitions involve common questions as to the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution. I may give a few facts in Writ Petition No. 135 of 1970 to show how the question arises in this petition. Writ Petition No. 135 of 1970 was filed by the petitioner on March 21, 1970, under Article 32 of the Constitution for enforcement of his fundamental rights under Articles 25, 26, 14, 19(1)(*f*) and 31 of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act No. 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969) be declared unconstitutional, ultra vires and void. He further prayed for an appropriate writ or order to issue during the pendency of the petition. This Court issued rule nisi on March 25, 1970.

3. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act No. 25 of 1971) was passed which received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional grounds and to impugn the constitutional validity of the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act No. 25 of 1971).

4. In the meantime, the Supreme Court by its judgment, dated April 26, 1971, in *Kunjukutty Sahib* v. *State of Kerala*[1] upheld the majority judgment of the Kerala High Court in *V. N. Narayanan Nair* v. *State of Kerala*[2] whereby certain sections of the Act were struck down.

5. The Constitution (Twenty-fourth Amendment) Act came into force on November 5, 1971, the Constitution (Twenty-fifth Amendment) Act came into force on April 20, 1972 and the Constitution (Twenty-ninth Amendment) Act came into force on June 9, 1972. The effect of the Twenty-ninth Amendment of the Constitution was that it inserted the following Acts in the Ninth Schedule to the Constitution:

> "65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).
>
> 66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971)."

6. The petitioner then moved an application for urging additional grounds and for amendment of the writ petition in order to challenge the above constitutional amendments.

---

[1] (1972) 2 SCC 364.

[2] AIR 1971 Ker 98: ILR (1970) 2 Ker 315: 1970 Ker LJ 638.

7. The Court allowed the application for urging additional grounds and for amendment of the writ petition on August 10, 1972, and issued notices to the Advocates-General to appear before this Court and take such part in the proceedings as they may be advised.

8. When the case was placed before the constitutional bench, it referred this case to a larger bench to determine the validity of the impugned constitutional amendments.

9. Similar orders were passed in the other writ petitions.

10. The larger bench was accordingly constituted. It was then felt that it would be necessary to decide whether *I. C. Golak Nath* v. *State of Punjab*[3] was rightly decided or not. However, as I see it, the question whether *Golak Nath's case* (supra), was rightly decided or not does not matter because the real issue is different and of much greater importance, the issue being: what is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2) on Parliament?

11. The respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under Article 368.

12. On the side of the petitioners it is urged that the power of Parliament is much more limited. The petitioners say that the Constitution gave the Indian citizens freedoms which were to subsist for ever and the Constition was drafted to free the nation from any future tyranny of the representatives of the people. It is this freedom from tyranny which, according to the petitioners, has been taken away by the impugned Article 31-C which has been inserted by the Twenty-fifth Amendment. If Article 31-C is valid, they say, hereafter Parliament and State Legislatures and not the Constitution, will determine how much freedom is good for the citizens.

13. These cases raise grave issues. But however grave the issues may be, the answer must depend on the interpretation of the words in Article 368, read in accordance with the principles of interpretation which are applied to the interpretation of a Constitution given by the people to themselves.

14. I must interpret Article 368 in the setting of our Constitution, in the background of our history and in the light of our aspirations and hopes, and other relevant circumstances. No other constitution in the world is like ours. No other constitution combines under its wings such diverse peoples, numbering now more than 550 millions, with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.

15. I need hardly observe that I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery for government, has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles.

---

[3] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

Part II—Interpretation of Golak Nath's case

16. Before proceeding with the main task, it is necessary to ask: what was decided in *I. C. Golak Nath* v. *State of Punjab* (supra). In order to properly appreciate that case, it is necessary first to have a look at *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*[4] and *Sajjan Singh* v. *State of Rajasthan.*[5]

17. The Constitution (First Amendment) Act, 1951, which inserted inter alia Articles 31-A and 31-B in the Constitution was the subject-matter of decision in *Sankari Prasad's case* (supra). The main arguments relevant to the present case which were advanced in support of the petition before this Court were summarised by Patanjali Sastri, J., as he then was, as follows:

> "First, the power of amending the Constitution provided for under Article 368 was conferred not on Parliament but on the two Houses of Parliament as a designated body and, therefore, the provisional Parliament was not competent to exercise that power under Article 379.
>
> Fourthly, in any case Article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Article 368.
>
> Fifthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Article 13(2)."

* * * *

18. As stated in the head note this* Court held:

> "The provisional Parliament is competent to exercise the power of amending the Constitution under Article 368. The fact that the said article refers to the two Houses of the Parliament and the President separately and not to the Parliament, does not lead to the inference that the body which is invested with the power to amend is not the Parliament but a different body consisting of the two Houses. The words 'all the powers conferred by the provisions of this Constitution on Parliament' in Article 379 are not confined to such powers as could be exercised by the provisional Parliament consisting of a single chamber, but are wide enough to include the power to amend the Constitution conferred by Article 368."

19. I may mention that Mr. Seervai contends that the conclusion just mentioned was wrong and that the body that amends the Constitution under Article 368 is not Parliament.

20. The Court further held:

> "The view that Article 368 is a complete code in itself in respect of the procedue provided by it and does not contemplate any amendment of a Bill for amendment of the Constitution after it has been introduced, and that if the Bill is amended during its passage through the House,

---

[4] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[5] (1965) 1 SCR 933: AIR 1965 SC 845: (1965) 1 SCJ 377.

* in SCR.

the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed by Article 368 and would be invalid, is erroneous.

Although 'Law' must ordinarily include constitutional law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and constitutional law, which is made in the exercise of constituent power. In the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368."

21. Although the decision in *Sankari Prasad's case* (supra) was not challenged in *Sajjan Singh's case* (supra) Gajendragadkar, C. J., thought it fit to give reasons for expressing full concurrence with that decision.

22. The only contention before the Court was that "since it appears that the powers prescribed by Article 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid". According to Gajengadradkar, C J. "that raised the question about the construction of the provisions contained in Article 368 and the relation between the substantive part of Article 368 with its proviso".

23. The Chief Justice came to the conclusion that "as a matter of construction, there is no escape from the conclusion that Article 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso".

24. The learned Chief Justice thought that the power to amend in the context was a very wide power and it could not be controlled by the literal dictionary meaning of the word "amend". He expressed his agreement with the reasoning of Patanjali Sastri, J., regarding the applicability of Article 13(2) to Constitution Amendment Acts passed under Article 368. He further held that when Article 368 confers on Parliament the right to amend the Constitution, it can be exercised over all the provisions of the Constitution. He thought that "if the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Article 13(2), they would have taken the precaution of making a clear provision in that behalf".

25. He seemed to be in agreement with the following observations of Kania, C. J., in *A. K. Gopalan* v. *The State of Madras*[6]:

"The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."

26. He was of the view that even though the relevant provisions of Part III can be justly described as the very foundation and the corner-stone of the democratic way of life ushered in this country by the Constitution, it cannot be said that the fundamental rights guaranteed to the citizens are enternal and inviolate in the sense that they can never be abridged or amended.

---

[6] 1950 SCR 88 at 100: AIR 1950 SC 27: 1950 SCJ 174.

27. According to him, it was legitimate to assume that the Constitution-makers visualised that Parliament would be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country.

28. Hidayatullah, J., as he then was, agreed with the Chief Justice that the 17th Amendment was valid even though the procedure laid down in the proviso to Article 368 had not been followed. But he expressed his difficulty in accepting the part of the reasoning in *Sankari Prasad's case* (supra). He observed as follows:

> "It is true that there is no complete definition of the word 'law' in the Article but it is significant that the definition does not seek to exclude constitutional amendments which it would have been easy to indicate in the definition by adding 'but *shall not include an amendment of the Constitution*'." (page 958).

He further observed:

> "The meaning of Article 13 thus depends on the sense in which the word 'law' in Article 13(2) is to be understood. If an amendment can be said to fall within the term 'law', the Fundamental Rights become 'eternal and inviolate' to borrow the language of Japanese Constitution. Article 13 is then on part with Article 5 of the American Federal Constitution in its immutable prohibition as long as it stands." (page 958).

29. According to him "Our Preamble is more akin in nature to the American Declaration of Independence (July 4, 1776) than to the preamble to the Constitution of the United States. It does not make any grant of power but it gives a direction and purpose to the Constitution which is reflected in Parts III and IV. Is it to be imagined that a two-thirds majority of the two Houses at any time is all that is necessary to alter it without even consulting the States? It is not even included in the proviso to Article 368 and it is difficult to think that as it has not the protection of the proviso it must be within the main part of Article 368.

30. He further observed:

> "I would require stronger reasons than those given in *Sankari Prasad's case* (supra), to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States."

He held:

> "What Article 368 does is to lay down the *manner of amendment and the necessary conditions* for the effectiveness of the amendment......................
>
> The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play-things of a special majority. To hold this would mean *prima facie* that the most solemn parts of our Constitution stand on the same footing as any other provision and even on

> a less firm ground than one on which the articles mentioned in the proviso stand."

31. Mudholkar, J., although agreeing that the writ petition should be dismissed, raised various doubts and he said that he was reserving his opinion on the question whether *Shankari Prasad's case* (supra), was rightly decided. He thought:

> "The language of Article 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of to normal legislative power. The only difference in respect of an amendment of the Constitution is that the Bill amending the Constitution has to be passed by a special majority (here I have in mind only those amendments which do not attract the proviso to Article 368). The result of a legislative action of a Legislature cannot be other than 'law' and, therefore, seems to me that the fact that the legislation deals with the amendment of provision of Constitution would not make its result anytheless a 'law'."

He observed:

> "It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Article 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Article 368 some of which are perhaps less vital than fundamental rights. It is possible, as suggested by my learned brother, that Article 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution which, I think, has to be ascertained from the provision sought to be amended or other relevant provisions or the preamble."

Later, he observed:

> "Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?"

He posed a further question by observing:

> "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting part of the Constitution; and if the latter, would it be within the purview of Article 368?"

He then stressed the prime importance of preamble:

> "The Constitution indicates three modes of amendments and assuming that the provisions of Article 368 confer power on Parliament to amend the Constitution, it will still have to be considered whether as long as the preamble stands unamended, that power can be exercised with respect to any of the basic features of the Constitution.
>
> To illustrate my point, as long as the words 'sovereign democratic republic' are there, could the Constitution be amended so as to depart from the democratic form of Government or its republic character? If that cannot be done, then, as long as the words 'Justice, social,

economic and political, etc.,' are there could any of the rights enumerated in Articles 14 to 19, 21, 25, 31 and 32 be taken away? If they cannot, it will be for consideration whether they can be modified.

It has been said, no doubt, that the preamble is not a part of our Constitution. But, I think, that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently if these features are an amplification or concretisation of the concepts set out in the preamble it may have to be considered whether the preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an Act of a Legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?"

32. Coming now to *Golak Nath's case* (supra), the petitioner had challenged the validity of the Constitution (Seventeenth Amendment) Act, 1964 which included in the Ninth Schedule, among other acts, the Punjab Security of Land Tenures Act, 1953 (Act 10 of 1953), and the Mysore Land Reforms Act, 1962 (Act 10 of 1962), as amended by Act 14 of 1965.

33. It was urged before the Court that *Sankari Prasad's case* (supra), in which the validity of the Constitution (First Amendment) Act, 1951 and *Sajjan Singh's case* (supra), in which the validity of the Constitution (Seventeenth Amendment) Act was in question had been wrongly decided by this Court.

34. Subba Rao, C. J., speaking for himself and four other Judges summarised the conclusions at page 815 as follows:

"The aforesaid discussion leads to the following results:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (10 of 1953),

> and the Mysore Land Reforms Act, 1962 (10 of 1962), as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution."

35. It must be borne in mind that these conclusions were given in the light of the Constitution as it stood then, i. e., while Article 13(2) subsisted in the Constitution. It was then not necessary to decide the ambit of Article 368 with respect to the powers of Parliament to amend Article 13(2) or to amend Article 368 itself. It is these points that have now to be decided.

36. It may further be observed that the Chief Justice refused to express an opinion on the contention that, in exercise of the power of amendment, Parliament cannot destroy the fundamental structure of the Constitution but can only modify the provision thereof within the framework of the original instrument for its better effectuation.

37. As will be seen later, the first conclusion above, does not survive for discussion any longer because it is rightly admitted on behalf of the petitioners that the Constitution (Twenty-Fourth Amendment) Act, 1971, in so far as it transfers power to amend the Constitution from the residuary entry (Entry 97, List I) or Article 248 of the Constitution to Article 368, is valid; in other words Article 368 of the Constitution as now amended by the Twenty-Fourth Amendment deals not only with the procedure for amendment but also confers express power on Parliament to amend the Constitution.

38. I will also not discuss the merits of the second conclusion as the same result follows in this case even if it be assumed in favour of the respondents that an amendment of the Constitution is not law within Article 13(2) of the Constitution.

39. Hidayatullah, J., as he then was, came to the following conclusions at page 902:

> "(*i*) that the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;
>
> (*ii*) that *Sankari Prasad's case* (supra) [and *Sajjan Singh's case* (supra), which followed it] conceded the power of amendment over Part III of the Constitution on an erroneous view of Articles 13(2) and 368;
>
> (*iii*) that the first, fourth and seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;
>
> (*iv*) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Article 13(2) in particular;
>
> (*v*) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and
>
> (*vi*) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (10 of 1953) and the Mysore Land Reforms Act,

1961 (10 of 1962) as amended by Act 14 of 1965 are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by Article 31-A, and the President's assent."

40. I am not giving his reasons for these conclusions here because they will be examined when dealing with the agruments addressed to us on various points.

41. Wanchoo, J., as he then was, also speaking on behelf of two other judges held that *Sankari Prasad's case* (supra), was correctly decided and the majority in *Sajjan Singh's case* (supra), was correct in following that decision.

41-A. Bachawat, J. held—

(1) Article 368 not only prescribes the procedure but also gives the power of amendment;

(2) Article 368 gives the power of amending each and every provision of the Constitution and as Article 13(2) is a part of the Constitution it is within the reach of the amending power;

(3) Article 368 is not controlled by Article 13(2) and the prohibitory injunction in Article 13(2) is not attracted against the amending power;

(4) Constitutional amendment under Article 368 is not a law within the meaning of Article 13(2);

(5) The scale of values embodied in Parts III and IV is not immortal. Parts III and IV being parts of the Constitution are not immune from amendment under Article 368. Constitution-makers could not have intended that the rights conferred by Part III could not be altered by giving effect to the policies of Part IV.

(6) The preamble cannot control the unambiguous language of the articles of the Constitution.

42. Regarding the amendment of the basic features of the Constitution, he observed:

> "Counsel said that they could not give an exhaustive catalogue of the basic features, but sovereignty, the republican form of government, the federal structure and the fundamental rights were some of the features. The Seventeenth Amendment has not derogated from the sovereignty, the republican form of government and the federal structure, and the question whether they can be touched by amendment does not arise for decision. For the purposes of these cases, it is sufficient to say that the fundamental rights are within the reach of the amending power."

43. Ramaswami, J., held:

(1) The amending power under Article 368 is sui generis.

(2) "Law" in Article 13(2) cannot be construed so as to include 'law' made by Parliament under Articles 4, 169, 362, 5th Schedule Part D and 6th Schedule Para 21.

(3) The expression "fundamental rights" does not lift the fundamental rights above the Constitution itself.

(4) Both the power to amend and the procedure to amend are enacted in Article 368.

(5) There were no implied limitations on the amending power and all articles of the Constitution were amendable either under the proviso of Article 368 or under the main part of the article.

(6) The Federal structure is not an essentital part of our Constitution.

(7) The power of amendment is in point of quality an adjunct of sovereignty. If so, it does not admit of any limitations.

44. In brief 6 Judges held that in view of Article 13(2) Fundamental Rights could not be abridged or taken away. Five Judges held that Article 13 (2) was inapplicable to Acts amending the Constitution.

Part III—Interpretation of Article 368

45. Let me now proceed to interpret Article 368.

Article 368, as originally enacted, read as follows:

> "An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in—
>
> (*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or
>
> (*b*) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or
>
> (*c*) any of the lists in the Seventh Schedule, or
>
> (*d*) the representation of States in Parliament, or
>
> (*e*) the provisions of this article,
>
> the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the first Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

46. It will be noticed that Article 368 is contained in a separate part and the heading is "Amendment of the Constitution", but the marginal note reads, "Procedure for amendment of the Constitution".

47. The expression "Amendment of the Constitution" is not defined or expanded in any manner, although in other parts of the Constitution, the word "Amend" or "Amendment" has, as will be pointed out later, been expanded. In some parts they have clearly a narrow meaning. The proviso throws some light on the problem. First, it uses the expression "If such amendment seeks to make any change in"; it does not add the words "change of", or omit "in", and say "seeks to change" instead of the expression "seeks to make any change in".

48. The articles which are included in the proviso may be now considered. Part V, Chapter I deals with "the Executive". Article 52, provides that there shall be a President of India, and Article 53 vests the executive power of the Union in the President and provides how it shall be exercised.

These two articles are not mentioned in the proviso to Article 368 but Articles 54 and 55 are mentioned. Article 54 provides:

> "54. The President shall be elected by the members of an electoral college consisting of—
>
> (*a*) the elected members of both Houses of Parliament; and
>
> (*b*) the elected members of the Legislative Assemblies of the States."

49. Article 55 prescribes the manner of election of the President

50. Why were Articles 52 and 53 not mentioned in the proviso to Article 368 if the intention was that the States would have a say as to the federal structure of the country? One of the inferences that can be drawn is that the Constitution-makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India. In other words they did not contemplate a monarchy being set up in India or there being no President.

51. Another article which has been included in the proviso to Article 368 is Article 73 which deals with the extent of executive powers of the Union. As far as the Vice-President is concerned, the States have been given no say whether there shall be a Vice-President or not; about the method of his election, etc. But what is remarkable is that when we come to Part VI of the Constitution, which deals with the "States", the only provision which is mentioned in the proviso to Article 368 is Article 162 which deals with the extent of executive power of States. The appointment of a Governor, conditions of service of a Governor, and the Constitution and functions of the Council of Ministers, and other provisions regarding the Ministers and the conduct of government business are not mentioned at all in the proviso to Article 368. Another article which is mentioned in clause (*a*) of the proviso to Article 368 is Article 241. which originally dealt with High Courts for States in Part C of the First Schedule.

52. Chapter IV of Part V of the Constitution which deals with the Union Judiciary, and Chapter V of Part VI which deals with the High Courts in the State are included in the proviso to Article 368 but it is extraordinary that Chapter VI of Part VI which deals with subordinate Judiciary is not mentioned in clause (*b*). Chapter I of Part XI is included and this deals with the Legislative Relations between the Union and the States, but Chapter II of Part XI which deals with Adaministrative Relations between the Union and the States, and various other matters in which the States would be interested are not included. Provisions relating to services under the State and Trade and Commerce are also not included in the proviso.

53. This analysis of the provisions contained in clauses (*a*) and (*b*) of the proviso to Article 368 shows that the reason for including certain articles and excluding certain other form the proviso was not that all articles dealing with the federal structure or the status of the States had been selected for inclusion in the proviso.

54. Clause (*c*) of the proviso mentions the lists in the Seventh Schedule, clause (*d*) mentions the representation of State in Parliament, and clause (*e*) the provisions of Article 368 itself. The provisions of sub-clauses (*c*), (*d*) and (*e*) can rightly be said to involve the federal structure and the rights of the States.

55. What again is remarkable is that the fundamental rights are not included in the proviso at all. Were not the States interested in the fundamental rights of their people? The omission may perhaps be understandable because of the express provision of Article 13(2) which provided that State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall to the extent of the contravention be void, assuming for the present that Article 13 (2) operates on constitutional amendments.

56. In construing the expression "amendment of this Constitution" I must look at the whole scheme of the Constitution. It is not right to construe words in vacuum and then insert the meaning into an article. Lord Green observed in *Bidie* v. *General Accident, Fire and Life Assurance Corporation*[7]:

> "The first thing one has to do, I venture to think, in construing words in a Section of an Act of Parliament is not to take those words *in vacuo*, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modity. It is to read the statute as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what is the true meaning of that words'."

57. I respectfully adopt the reasoning of Lord Green in construing the expression "the amendment of the Constitution."

58. Lord Green is not alone in this approach. In *Bourne* v. *Norwich Crematorium*[8] it is observed:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence defined separately by reference to the dictionary or decided casses, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language "

59. Holmes, J., in *Towne* v. *Eisner*,[9] had the same thought. He observed:

> "A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.

60. What Holmes, J., said is particularly true of the word "Amendment" or "Amend".

61. I may also refer to the observation of Gwyer, C. J., and Lord *Wright*:

> "A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the *implications* of the

---

[7] (1948) 2 All ER 995, 998.
[8] (1967) 2 All ER 576, 578.
[9] 245 US 418, 425: 62 L Ed 372, 376.

> context, and even by considerations arising out of what appears to be the *general scheme* of the Act". (Per Gwyer, C. J.—The Central Provinces and Berar Act, 1939, FCR 18 at 42 M. R.").
>
> "The question, then, is one of construction and in the ultimate resort must be determined upon the actual words used, *read not in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another. The constitution has been described as the federal compact, and the Construction must hold a balance between all its parts". (Per Lord Wright—*James* v. *Commonwealth of Australia*, 1936 AC 578 at 613.)"

62. In the Constitution the word "amendment" or "amend" has been used in various places to mean different things. In some articles, the word "amendment" in the context has a wide meaning and in another context it has a narrow meaning. In Article 107, which deals with legislative procedure, clause (2) provides that "subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the House of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses". It is quite clear that the word "amendment" in this article has a narrow meaning. Similarly, in Article 111 of the Constitution, whereby the President is enabled to send a message requesting the Houses to consider the desirability of introducing amendments, the word "amendments" has a narrow meaning.

63. The opening of Article 4(1) reads:

> "4. (1) Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law .. .. "

Here the word "amendment" has a narrower meaning. "Law" under Articles 3 and 4 must "*conform to the democratic pattern envisaged by the Constitution*; and the power which the Parliament may exercise ..... *is not the power to override the constitutional scheme* No state can, therefore, be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs". (Per Shah, J.—*Mangal Singh* v *Union of India*.)[10] (Emphasis supplied).

64. Article 169(2) reads:

> "Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary."

Here also the word "amendment" has a narrow meaning.

65. Para 7 of Part D, Fifth Schedule, which deals with amendment of the schedule, reads:

> "7. *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such schedule as so amended."

---

[10] (1967) 2 SCR 109 at 112: AIR 1967 SC 944: (1968) 1 SCJ 240.

Here the word "amend" has been expanded by using the expression "by way of addition, variation or repeal", but even here, it seems to me, the amendments will have to be in line with the whole Constitution. Similarly, under Para 21 of the Sixth Schedule, which repeats the phraseology of Para 7 of the Fifth Schedule, it seems to me, the amendments will have to be in line with the Constitution.

66. I may mention that in the case of the amendments which may be made in exercise of the powers under Article 4, Article 169, Para 7 of the Fifth Schedule, and Para 21 of the Sixth Schedule, it has been expressly stated in these provisions that they shall not be deemed to be amendments of the Constitution for the purposes of Article 368.

67. It is also important to note that the Constituent Assembly which adopted Article 368 on September 17, 1949, had earlier on August 18, 1949, substituted the following section in place of the old Section 291 in the Government of India Act, 1935:

> "291. *Power of the Governor-General to amend certain provisions of the Act and orders made thereunder.*—(1) The Governor-General may at any time by order make such amendments as he considers necessary whether by way of addition, modification or repeal, in the provisions of this Act or of any order made thereunder in relation to any provincial Legislature with respect to any of the following matters, that is to say –
>
> (*a*) the composition of the Chamber or Chambers of the Legislature;
>
> (*b*) the delimitation of territorial constituencies for the purpose of elections under this Act.
>
> (2) * * * * *"

Here, the word "amendment" has been expanded. It may be that there really is no expansion because every amendment may involve addition, variation or repeal of part of a provision.

68. According to Mr. Seervai, the power of amendment given by Article 4, read with Articles 2 and 3, Article 169, Fifth Schedule and Sixth Schedule, is a limited power limited to certain provisions of the Constitution, while the power under Article 368 is not limited. It is true every provision is prima facie amendable under Article 368 but this does not solve the problem before us.

69. I may mention that an attempt was made to expand the word "amend" in Article 368 by proposing an amendment that "by way of variation, addition, or repeal" be added but the amendment was rejected. (C. A. D., Vol. 9, p. 1663).

70. Again, in Article 169(2), the word "amendment" has been used in a limited sense. Article 196(2) reads:

> "196. (2) Subject to the provisions of Articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by

both Houses, either without amendment or with such amendments only as are agreed to by both Houses."

71. Similar meaning may be given to the word "amendment" in Article 197(2), which reads:

> "197. (2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—
>
> (*a*) the Bill is rejected by the Council; or
>
> (*b*) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or
>
> (*c*) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,
>
> the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly."

72. Under Article 200 the Governor is enabled to suggest the desirability of introducing any such amendments as he may recommend in his message. Here again "amendment" has clearly a limited meaning.

In Article 35(*b*) the words used are:

> "Any law in force immediately before the commencement of this Constitution…………subject to the terms thereof and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament."

73. Here, all the three words are used giving a comprehensive meaning. Reliance is not placed by the draftsman only on the word "amend".

74. Similar language is used in Article 372 whereby existing laws continue to be in force until "altered or repealed or amended" by a competent Legislature or other competent authority.

75. In the original Article 243(2), in conferring power on the President to make regulations for the peace and good government of the territories in Part D of the First Schedule, it is stated that "any regulation so made may repeal or amend any law made by Parliament". Here, the two words together give the widest power to make regulations inconsistent with any law made by Parliament.

76. In Article 252 again, the two words are joined together to give a wider power. Clause (2) of Article 252 reads:

> "252. (2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State."

77. In the proviso to Article 254, which deals with the inconsistency between laws made by Parliament and laws made by the Legislatures of States, it is stated:

> "Provided that nothing in this clause shall prevent Parliament from

> enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

78. In Article 320(5), "all regulations made under the proviso to clause (3)" can be modified "whether by way of repeal or amendment" as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

79. I have referred to the variation in the language of the various articles dealing with the question of amendment or repeal in detail because our Constitution was drafted very carefully and I must presume that every word was chosen carefully and should have its proper meaning. I may rely for this principle on the following observations of the United States Supreme Court in *Holmes* v. *Jennison*,[11] and quoted with approval in *William* v. *United States*[12]:

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added..........."

80. Reference was made to Section 6(2) of the Indian Independence Act, 1947, in which the last three lines read:

> "........ ...and the powers of the Legislature of each dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the dominion."

Here, the comprehensive expression "repeal or amend" gives power to have a completely new Act different from an existing act of Parliament.

81. So, there is no doubt from a perusal of these provisions that different words have been used to meet different demands. In view of the great variation of the phrases used all through the Constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the Constitution. There is no doubt that it is not intended that the whole Constitution could be repealed. This much is conceded by the learned counsel for the respondents.

82. Therefore, in order to appreciate the real content of the expression "amendment of this Constitution", in Article 368 I must look at the whole structure of the Constitution. The Constitution opens with a preamble which reads:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens;
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all;
>
> FRATERNITY assuring the dignity of the individual and the unity of the Nation;

---

[11] 10 L Ed 579, 594.

[12] 77 L Ed 1372, 1380.

IN OUR CONSTITUENT ASSEMBLY this Twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

83. This Preamble, and indeed the Constitution, was drafted in the light and direction of the Objective Resolution adopted on January 22, 1947, which runs as follows:

(1) THIS CONSTITUENT ASSEMBLY declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States, as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of Government, are derived from the people;

(5) wherein shall be guaranteed and secured to all the people of India Justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations; and

(8) this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

84. While moving the resolution for acceptance of the Objectives Resolution, Pandit Jawaharlal Nehru said:

> "It seeks very feebly to tell the world of what we have thought or dreamt for so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I, Sir, also with all respect, suggest to you and to the House that, when the time comes for the passing of this

Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge anew."

85. I may here trace the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution. This appears from the following brief survey of the history of the framing of the Preamble extracted from the Framing of India's Constitution (A study) by B. Shiva Rao. In the earliest draft the Preamble was something formal and read: "We, the people of India, seeking to promote the common good, do hereby, through our chosen representatives, enact, adopt and give to ourselves this Constitution".[13]

86. After the plan of June 3, 1947. which led to the decision to partition the country and to set up two independent dominions of India and Pakistan, on June 8, 1947, a joint sub-committee of the Union Constitution and Provincial Constitution Committees, took note that the objective resolution would require amendment in view of the latest announcement of the British Government. The announcement of June 3 had made it clear that full independence, in the form of Dominion Status, would be conferred on India as from August 15, 1947. After examining the implications of partition the sub-committee thought that the question of making changes in the Objectives Resolution could appropriately be considered only when effect had actually been given to the June 3, Plan.[14] The Union Constitution Committee provisionally accepted the Preamble as drafted by B. N. Rao and reproduced it in its report of July 4, 1947, without any change, with the tacit recognition at that stage that the Preamble would be finally based on the Objectives Resolution. In a statement circulated to Members of the Assembly on July 18, 1947, Pandit Jawaharlal Nehru, inter alia, observed that the Preamble was covered more or less by the Objectives Resolution which it was intended to incorporate in the final Constitution subject to some modification on account of the political changes resulting from partition. Three days later, moving the report of the Union Constitution Committee for the consideration of the Assembly, he suggested that it was not necessary at that stage to consider the draft of the Preamble since the Assembly stood by the basic principles laid down in the Objectives Resolution and these could be incorporated in the Preamble in the light of the changed situation.[15] The suggestion was accepted by the Assembly and further consideration of the Preamble was held over.

87. We need not consider the intermediate drafts, but in the meantime the declaration (See *Constituent Assembly Debates*, Vol. 8, page 2) was adopted at the end of April, 1949, by the Government of the various Commonwealth countries and the resolution was ratified by the Constituent Assembly on May 17, 1949, after two days debate.

88. In the meantime the process of merger and integration of Indian States had been completed and Sardar Vallabhbhai Patel was able to tell the Constituent Assembly on October 12, 1949, that the new Constitution was

---

[13] Shiva Rao's: *Framing of India's Constitution—A study*, p. 127.

[14] Special Sub-Committee minutes, June 9, 1947. Later on July 12, 1947, the special sub-committee again postponed consideration of the matter. Select Documents II, 20(*ii*), p. 617. (Shiva Rao's: *Framing of India's Constitution—A study*, p. 127 footnote).

[15] Shiva Rao's *Framing of India's Constitution—A study*, pp. 127-128 (also *see* footnote 1, p. 128).

"not an alliance between democracies and dynasties, but a real union of the Indian people, built on the basic concept of the sovereignty of the people".[16]

89. The draft Peamble was considered by the Assembly on October 17, 1949. Shiva Rao observes that "the object of putting the Preamble last, the President of the Assembly explained, was to see that it was in confirmity with the Constitution as accepted".[16] "Once the transfer of power had taken place the question of British Parliament's subsequent approval which was visualised in the British Cabinet Commission's original plan of May 1946 could no longer arise. The sovereign character of the Constituent Assembly thus became automatic with the rapid march of events without any controversy, and the words in the Preamble "give to ourselves this Constitution" became appropriate. The Preamble was adopted by the Assembly without any alteration. Subsequently the words and figure "this twenty-sixth day of November, 1949" were introduced in the last paragraph to indicate the date on which the Constitution was finally adopted by the Constituent Assembly".[17] (p. 131).

90. Regarding the use which can be made of the preamble in interpreting an ordinary statute, there is no doubt that it cannot be used to modify the language if the language of the enactment is plain and clear. If the language is not plain and clear, then the preamble may have effect either to extend or restrict the language used in the body of an enactment. "If the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble". (See *Tribhuban Parkash Nayyar* v. *The Union of India*).[17]

91. We are, however, not concerned with the interpretation of an ordinary statute As Sir Alladi Krishnaswami, a most eminent lawyer said, "so far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has to be attached to the Preamble in a constitutional statute". (*Constituent Assembly Debate*, Vol. 10, p. 417). Our Preamble outlines the objectives of the whole constitution. It expresses "what we had thought or dreamt for so long".

92. In *re Berubari Union and Exchange of Enclaves*[18] this was said about the Preamble:

> "There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the Preamble to the Constitution is, in the words of Story, 'a key to open the mind of the makers' which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the Preamble is not a part of the Constitution, and, as Willoughby has observed about the Preamble to the American Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.
>
> What is true about the powers is equally true about the prohibitions and limitations."

---

[16] Shiva Rao's: *Framing of India's Constitution—A study*, pp. 130-132.

[17] (1970) 2 SCR 732-737: (1969) 3 SCC 99.

[18] (1960) 3 SCR 250, 281-82: AIR 1960 SC 845: 1960 SCJ 933.

93. Wanchoo, J., in *Golak Nath* v. *State of Punjab*[19] relied on *Berubari's case* (supra) and said:

> "On a parity of reasoning we are of opinion that the preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on the power to amend the Constitution contained in Art 368."

Bachawat, J., in this case observed:

> "Moreover the Preamble cannot control the unambiguous language of the articles of the Constitution, (see Wynes, *Legislative Executive and Judicial Powers in Australia*, Third Edition, pp. 694-5; *In re, Berubari Union & Exchange of Enclaves*[20]"

94–98. With respect, the Court was wrong in holding, as has been shown above, that the Preamble is not a part of the Constitution unless the court was thinking of the distinction between the Constitution Statute and the Constitution, mentioned by Mr. Palkhivala. It was expressly voted to be a part of the Constitution. Further, with respect, no authority has been referred before us to establish the proposition that "what is true about the powers is equally true about the prohibitions and limitations". As I will show later, even from the Preamble limitations have been derived in some cases.

99. It is urged in the written submission of Mr. Palkhivala that there is a distinction between the Indian Constitution Statute and the Constitution of India. He urges as follows:

> "This Constitution" is the Constitution which follows the Preamble. It starts with Article 1 and ended originally with the Eighth Schedule and now ends with the Ninth Schedule after the First Amendment Act, 1951. The way the Preamble is drafted leaves no doubt that what follows, or is annexed to, the Preamble, is the Constitution of India."

100. He has also urged that the Preamble came into force on November 26, 1949 alongwith Articles 5, 6, 7 etc. as provided in Article 394 because Articles 5, 6, 7 and the other Articles mentioned therein could hardly come into force without the enacting clause mentioned in the Preamble having come into force He says that the Preamble is a part of the Constitution Statute and not a part of the Constitution but precedes it. There is something to be said for this contention but, in my view, it is not necessary to base my decision on this distinction as it is not necessary to decide in the present case whether Article 368 enables Parliament to amend the Preamble. Parliament has not as yet chosen to amend the Preamble.

101 The Preamble was used by this Court as an aid to construction in *Behram Khurshed Pessikaka* v. *The State of Bombay*.[21] After referring to Part III, Mahajan, C. J., observed:

> "We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and

---

[19] (1967) 2 SCR 762, 838 and 914: AIR 1967 SC 1643: (1967) 2 SCJ 486.

[20] (1960) 3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

[21] (1955) 1 SCR 613 at 653: AIR 1955 SC 123: 1955 SCJ 73.

> worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

102. Similarly in *In re, The Kerala Education Bill, 1957*,[22] Das, C.J., while considering the validity of the Kerala Education Bill, 1957 observed:

> "In order to appreciate the true meaning, import and implications of the provisions of the Bill which are said to have given rise to doubts, it will be necessary to refer first to certain provisions of the Constitution which may have a bearing upon the questions under consideration and then to the actual provision of the Bill. The inspiring and nobly expressed Preamble to our Constitution records the solemn resolve of the people of India to constitute......... (He then sets out the Preamble). Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship. To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights."

103. In *Sajjan Singh* v. *State of Rajasthan*[23] Mudholkar, J., after assuming that the Preamble is not a part of the Constitution, observed:

> "While considering this question it would be of relevance to bear in mind that the Preamble it not of the common run such as is to be found in an Act of a Legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?"

104. Quick and Garran in their [*Annotated Constitution of the Australian Commonwealth*, (1901) p. 284] adopted the following sentence from Lord Thring's "practical Legislation, p.36":

> "A Preamble may be used for other reasons: to limit the scope of certain expressions or to explain facts or introduce definitions."

105. Thornton on "*Legislative Drafting*", p. 137—opines that "construction of the Preamle may have effect either to extend or to restrict general language used in the body of an enactment".

106. In *Attorney-General* v. *Prince Ernest Augustus of Hanover*[24] the House of Lords considered the effect of the Preamble on the interpretation of Princes Sophia Naturalization Act, 1705. It was held that "as a matter of construction of the Act, there was nothing in the Act or its Preamble, interpreted in the light of the earlier relevant statutes............ capable of controlling and limiting the plain and ordinary meaning of the material words of enacting provisions and that the class of lineal descendants 'born or hereafter to be born' meant the class of such descendants in all degrees without any limit as to time". The House of Lords further held that "looking at the Act from the point of view of 1705 there was no such manifest absurdity in this construction as would entitle the court to reject it".

---

[22] 1959 SCR 995, 1018-1019: AIR 1958 SC 956: 1959 SCJ 321.

[23] (1965) 1 SCR 933, 968: AIR 1965 SC 845: (1965) 1 SCJ 377.

[24] 1957 AC 436, 460.

107. Mr. Seervai referred to the passage from the speech of Lord Normand at p.467. The passage is lengthy but I may quote these sentences:

> "It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the Preamble may legitimately prevail......If they admit of only one construction, that construction will receive effect even if it is inconsistent with the Preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the Preamble may be preferred."

108. Viscount Simonds put the matter at page 463, thus:

> "On the one hand, the proposition can be accepted that 'it is a settled rule that the Preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms'. I quote the words of Chitty, L. J., which were cordially approved by Lord Davey in *Powell* v. *Kempton Park Racecourse Co. Ltd.*, (1899) AC 143; (185). On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context."

109. This case shows that if on reading Article 368 in the context of the Constitution I find the word "Amendment" ambiguous I can refer to the Preamble to find which construction would fit in with the Preamble.

110. In *State of Victoria* v. *The Commonwealth*,[25] which is discussed in detail later, a number of Judges refer to the federal structure of the Constitution. It is in the preamble of the Commonwealth of Australia Constitution Act, 1902 that 'one indissoluble Federal Commonwealth', is mentioned.

111. There is a sharp conflict of opinion in Australia respecting the question whether an amendment can be made which would be inconsistent with the Preamble of the Constitution Act referring to the "Indissoluble" character and the sections which refer to the "Federal" nature of the Constitution. After referring to this conflict, Wynes[26] observes:

> "Apart from the rule which excludes the preamble generally from consideration in statutory interpretation, it is clear that, when all is said and done, the preamble at the most is only a recital of the intention which the Act seeks to effect; and it is a recital of a present (i.e., as in 1900) intention. But in any event the insertion of an express reference to amendment in the Constitution itself must surely operate as a qualification upon the mere recital of the reasons for its creation."

112. I am not called upon to say which view is correct but it does show that in Australia, there is a sharp conflict of opinion as to whether the Preamble can control the amending power.

113. Story in his *Commentaries on the Constitution of the United States* states: [(1883) Vol. 1].

> "It (Preamble) is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in

---

[25] 45 ALJ 251.
[26] Wynes: *Legislative, Executive and Judicial Powers in Australia*, Fourth Ed. p. 506.

> cases leading to an obvious absurdity, or to a direct overthrow of the intention express in the premable. (p. 444).
>
> There does not seem any reason why in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions." (p. 444)

Story further states at pages 447-448:

> "And the uniform doctrine of the highest judicial authority has accordingly been, that it was the act of the people and not of the states; and that it bound the latter, as subordinate to the people. 'Let us turn', said Mr. Chief Justice Jay, 'to the constitution. The people therein declare, that their design in establishing it comprehended six objects: (1) To form a more perfect union; (2) to establish justice; (3) to insure domestic tranquillity; (4) to provide for the common defence; (5) to promote the general welfare; (6) to secure the blessings of liberty to themselves and their posterity'. 'It would', he added, 'be pleasing and useful to consider and trace the relations, which of each these objects bears to the others; and to show, that, collectively, they comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy". In *Hunter* v. *Martin*, (1 Wheat, Rules 305, 324), the Supreme Court say, (as we have seen) 'the constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically as, the preamble of the constitution declares, by the people of the United States'; and language still more expressive will be found used on other solemn occasions."

114. "The Supreme Court of United States (borrowing some of the language of the Preamble to the Federal Constitution) has appropriately stated that the people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence". (*American Jurisprudence*, 2d. Vol. 16, p 184)

115. In the United States the Declaration of Independence is sometimes referred to in determining constitutional questions It is stated in *American Jurisprudence* (2d. Vol. 16 p. 189):

> "While statements of principles contained in the Declaration of Independence do not have the force of organic law and therefore cannot be made the basis of judicial decision as to the limits of rights and duties, yet it has been said that it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence, and the courts sometimes refer to the Declaration in determining constitutional questions."

116. It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

117. Now I may briefly describe the scheme of the Constitution. Part I of the Constitution deals with "the Union and its Territory". As originally enacted, Article 1 read as follows:

(1) India, that is Bharat, shall be a Union of States.

SCC Online

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

118. Article 2 enabled Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Articles 3 and 4 dealt with the formation of new States and alteration of areas, boundaries or names of existing States.

119. Part II dealt with "Citizenship". The heading of Part III is "Fundamental Rights". It first describes the expression "the State" to include "the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". (Article 12). Article 13 provides that laws inconsistent with or in derogation of the fundamental rights shall be void. This applies to existing laws as well as laws made after the coming into force of the Constitution. For the time being I assume that in Article 13(2) the would "law" includes constitutional amendment.

120. The fundamental rights conferred by the Constitution include right to equality before the law, (Article 14) prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, (Article 15) equality of opportunity in matters of public employment, (Article 16), right to freedom of speech and expression, to assemble peaceably and without arms, to form association or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property; and to practice any profession or to carry on any occupation, trade or business. (Article 19). Reasonable restrictions can be imposed on the rights under Article 19 in respect of various matters.

121. Article 20 protects a person from being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence or to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It further provides that no person shall be prosecuted and punished for the same offence more than once, and no person accused of any offence shall be compelled to be a witness against himself.

122. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure establish by law.

123. Article 22 gives further protection against arrest and detention in certain cases. Article 22(1) provides that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice". Article 22(2) provides that "every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate".

124. Article 22(4) deals with Preventive Detention. Article 23 prohibits traffic in human beings and other similar forms of forced labour. Article 24 provides that "no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment".

125. Articles 25, 26, 27 and 28 deal with the freedom of religion. Article 25(1) provides that "subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion". Article 26 enables every religious denomination or section thereof, subject to public order, morality and health, to establish and manage institutions for religious and, charitable purposes; to manage their own affairs in matters of religion, to own and acquire movable and immovable property, and to administer such property in accordance with law Article 27 enables persons to resist payment of any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Article 28 deals with freedom as to attendance at religious instruction or religious worship in certain educational institutions.

126. Article 29(1) gives protection to minorities and provides that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same". Article 29(2) provides that "no person shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them".

127. Article 30 gives further rights to minorities whether based on religion or language to establish and administer educational institutions of their choice. Article 30(2) prohibits the State from discriminating against any educational institution, in granting aid to educational institutions, on the ground that it is under the management of a minority, whether based on religion or language.

128. As will be shown later the inclusion of special rights for minorities has great significance. They were clearly intended to be inalienable.

129. The right to property comes last and is dealt with in Article 31. As originally enacted, it dealt with the right to property and prevened deprivation of property save by authority of law, and then provided for compulsory acquisition for public purposes on payment of compensation. It had three significant provisions, which show the intention of the Constitution-makers regarding propery rights. The first is Article 31(4). This provision was intended to protect legislation dealing with agrarain reforms. The second provision, Article 31(5)(*a*), was designed to protect existing legislation dealing with compulsory acquisition. Some acts, saved by this provision did not provide for payment of full compensation, e.g. U. P. Town Improvement Act, 1919. The third provision [Article 31(6)] provided a protective umbrella to similar laws enacted not more than eighteen months before the commencement of the Constitution.

130. The fundamental rights were considered of such importance that right was given to an aggrieved person to move the highest court of the land, i.e., the Supreme Court, by appropriate proceedings for the enforcement of the rights conferred by this part, and this was *guaranteed*. Article 32(2) confers very wide powers on the Supreme Court, to issue directions or orders or writs including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. Article 32(4) further provides that "the right guaranted by this article shall not be suspended except as otherwise provided for by this Constitution".

131. Article 33 enables Parliament by law to "determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them"

132. This article shows the care with which, the circumstances in which fundamental rights can be restricted or abrogated were contemplated and precisely described.

133. Article 34 enables Parliament, by law, to indemnify any person in the service of the Union, or of a state or any other person in connection with acts done while martial law was in force in a particular area.

134. Part IV of the Constitution contains directive principles of State policy. Article 37 specifically provides that "the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". This clearly shows, and it has also been laid down by this Court, that these provisions are not justiciable and cannot be enforced by any Court. The Courts could not, for instance, issue a *mandamus* directing the State to provide adequate means of livelihood to every citizen, or that the ownership and control of the material resources of the community be so distributed as best to subserve the common good, or that there should be equal pay for equal work for both men and women.

135. Some of the directive principles are of great fundamental importance in the governance of the country. But the question is not whether they are important; the question is whether they override the fundamental rights. In other words, can Parliament abrogate the fundamental rights in order to give effect to some of the directive principles?

136. I may now briefly notice the directive principles mentioned in Part IV. Article 38 provides that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Now, this directive is compatible with the fundamental rights because surely the object of many of the fundamental rights is to ensure that there shall be justice, social, economic and political, in the country. Article 39, which gives particular directions to the State, reads thus:

> "39. The State shall, in particular, direct its policy towards

securing—

(*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(*d*) that there is equal pay for equal work for both men and women;

(*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

(*f*) that childhood and youth are protected against exploitation and against moral and material abandonment."

137. Article 40 deals with the organisation of village panchayats. Article 41 deals with the right to work, to education and to public assistance in certain cases. Article 42 directs that the State shall make provisions for securing just and humane conditions of work and for maternity relief. Article 43 directs that "the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries, on an individual or co-operative basis in rural areas".

138. Article 44 enjoins that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". Desirable as it is, the. Government has not been able to take any effective steps towards the realisation of this goal. Obviously no Court can compel the Government to lay down a uniform civil code even though it is essentially desirable in the interest of the integrity and unity of the country.

139. Article 45 directs that "the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free compulsory education for all children until they complete the age of fourteen years". This again is a very desirable directive. Athough the Government has not been able to fulfil it completely, it cannot be compelled by any court of law to provide such education.

140. Article 46 supplements the directive given above and enjoins the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.

141. Article 47 lays down as one of the duties of the State to raise the standard of living and to improve public health, and to bring about prohibition. Article 48 directs the State to endeavour to organise agriculture and animal husbandry on modern and scientific lines, and in particular, to take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

142. Article 49 deals with protection of monuments and places and objects of national importance. Article 50 directs that the State shall take steps to separate the judiciary from the executive in the public services of the State This objective has been, to a large extent, carried out without infringing the fundamental rights.

143. In his preliminary note on the Fundamental Rights, Shri B. N. Rau, dealing with the directive principles, observed :

> "The principles set forth in this part are intended for the general guidance of the appropriate Legislatures and Government in India (hereinafter referred to collectively as 'the State'). The application of these principles *in legislation* and administration shall be the care of the State and shall not be cognizable by any court."

144. After setting out certain directive principles, he observed :

> "It is obvious that none of the above provisions is suitable for enforcement by the courts. They are really in the nature of moral precepts for the authorities of the State. Although it may be contended that the Constitution is not the proper place for moral precepts, nevertheless constitutional declarations of policy of this kind are now becoming increasingly frequent. (*See* the Introduction to the I. L. O. publication *Constitutional Provisions concerning Social and Economic Policy*, Montreal, 1944). They have at least an educative value". (pages 33-34—Shiva Rao : *Framing of Indian Constitution*, Doc , Vol. II).

Then he referred to the genesis of the various articles mentioned in the preliminary note.

145. One must pause and ask the question as to why did the Constituent Assembly resist the persistent efforts of Shri B. N. Rau to make fundamental rights subject to the directive principles. The answer seems plain enough. The Constituent Assembly deliberately decided not to do so.

146. Sri Alladi Krishnaswami Ayyar, in his note, dated March 14, 1947, observed :

> "A distinction has necessarily to be drawn between rights which are justiciable and rights which are merely intended as a guide and directive objectives to state policy." (page 67 supra).

147. It is impossible to equate the directive principles with fundamenal rights though it cannot be denied that they are very important. But to say that the directive principles give a directive to take away fundamental rights in order to achieve what is directed by the directive principles seems to me a contradication in terms.

148-49. I may here mention that while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly, on December 10, 1948, the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of Humam Rights. I may here quote only the Preamble :

> "Whereas recognition of the inherent dignity of the *equal and*

> *inalienable rights* of all members of the human family is the foundation of freedom justice and peace in the word. (emphasis supplied).
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.
>
> Whereas it is essential to promote the development of friendly relations between nations.
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.
>
> Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.
>
> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."

150. In the Preamble to the International Covenant on Economic and Social and Cultural Rights, 1966, inalienability of rights is indicated in the first Para as follows:

> "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

151. Do rights remain inalienable if they can be amended out of existence? The Preamble, Articles 1, 55, 56, 62, 68 and 76 of the United Nations Charter had provided the basis for the eleboration in the Universal Declaration of Human Rights. Although there is a sharp conflict of opinion whether respect for human dignity and fundamental human rights is obligatory under the Charter (see *Oppenheim's International Law*, 8th Ed. Vol. I, pp. 740-41; footnote 3), it seems, to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and solemn declaration subscribed to by India. Article 51 reads:

> "51. The State shall endeavour to—
>
> (*a*) promote international peace and security;
>
> (*b*) maintain just and honourable relations between nations;
>
> (*c*) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
>
> (*d*) encourage settlement of international disputes by arbitration".

152. As observed by Lord Denning in *Corocraft* v. *Pan American Airways*[27] "it is the duty of these courts to construe our legislation so as to be in confirmity with International Law and not in conflict with it". [See also *Oppenheim* (supra), pp. 45-46; *American Jurisprudence*, 2nd., Vol. 45, p. 351].

153. Part V, Chapter I, deals with the Executive; Chapter II with Parliament—conduct of its business, qualification of its members, legislation procedure, etc. Article 83 provides that:

> "83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.
>
> (2) The House of the Pepople, unless sooner dissolved, shall continue for five years from the date appinted for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House ….."

Under the proviso, this period can be extended while a Proclamation of Emergency is in operation for a period not exceeding in any case beyond a period of six months after the Proclamation has ceased to operate. It was provided in Article 85(1) before its amendment by the Constitution (First Amendment) Act, 1951 that the House of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sittings in one session and the date appointed for their first sitting in the next session.

154. Article 123 gives power to the President to promulgate ordinances during recess of Parliament. Chapter IV deals with the Union judiciary.

155. Part VI, as originally enacted, dealt with the States in Part A of the First Schedule—the Executive, the State Legislatures and the High Courts. Article 174 deals with the summoning of the House of Legislature and its provisions are similar to that of Article 85. Article 213 confers legislative powers on the Governor during the recess of State Legislature by promulgating ordinances.

156. Part XI deals with the relation between the Union and the States; Chapter I regulating legislative relations and Chapter II administrative relations.

157. Part XII deals with Finance, Property, Contracts and Suits. We need only notice Article 265 which provides that "no tax shall be levied or collected except by authority of law".

158. Part XIII deals with Trade, Commerce and Intercourse within Territory of India. Subject to the provisions of this Chapter, trade, commerce and intercourse throughout the territory of India shall be free. (Article 301).

159. Part XIV deals with Services under the Union and the States. Part XVI contains special provisions relating to certain classes—the Scheduled Castes, the Scheduled Tribes etc. It reserved seats in the House of the

---

[27] 1969 All ER 82, 87.

People for these classes. Article 331 enables the President to nominate not more than two members of the Anglo-Indian community if it is not adequately represented in the House of the People. Article 332 deals with the reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. In Article 334 it is provided that the above mentioned reservation of seats and special representation to certain classes shall cease on the expiry of a period of ten years from the commencement of this Constitution. Article 335 deals with claims of Scheduled Castes and Scheduled Tribes to services and posts. Article 336 makes special provisions for Anglo-Indian community in certain services, and Article 337 makes special provisions in respect of educational grants for the benefit of Anglo-Indian community. Article 338 provides for the creation of a Special Officer for Scheduled Castes, Scheduled Tribes, etc. to be appointed by the President, and prescribes his duties. Article 340 enables the President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India which shall present a report and make recommendations on steps that should be taken to remove difficulties and improve their condition. Article 341 enables the President to specify the castes, races or tribes or part of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State. Similarly, Article 342 provides that the President may specify the tribes or tribal communities or part of or groups within tribes or tribal communitees which shall be deemed to be Scheduled Tribes in relation to that State.

160. Part XVII deals with Official Language, and Part XVIII with Emergency Provisions. Article 352 is important. It reads:

> "352. (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect."

Article 353 describes the effect of the Proclamation of Emergency. The effect is that the executive power of the Union shall be extended to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised, and the Parliament gets the power to make laws with respect to any matter including the power to make laws conferring powers and imposing duties, etc., notwithstanding that it is one which is not enumerated in the Union list. Article 354 enables the President by order to make exceptions and modifications in the provisions of Articles 268 to 279. Under Article 355, it is the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordane with the provisions of the Constitution. Article 356 contains provisions in case of failure of constitutional machinery in a State.

161. Article 358 provides for suspension of the provisions of Article 19 during Emergency. It reads:

> "358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

162. Article 359 is most important for our purpose.

It provides that:

> "359. (1) Where a Proclamation of Emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.
>
> (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
>
> (3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

163. These two articles, namely Article 358 and Article 359 show that the Constitution-makers contemplated that Fundamental rights might impede the State in meeting an emergency, and it was accordingly provided that Article 19 shall not operate for a limited time, and so also Article 32 and Article 226 if the President so declares by order. If it was the design that fundamental rights might be abrogated surely they would have expressly provided it somewhere.

164. I may here notice an argument that the enactment of Articles 358 and 359 showed that the fundamental rights were not treated as inalienable rights. I am unable to infer this deduction from these articles. In an emergency every citizen is liable to be subjected to extraordinary restrictions.

165. I may here notice some relevant facts which constitute the backgound of the process of drafting the Constitution. The British Parliament knowing the complexities of the structure of the Indian people expressly provided in Section 6(6) of the Indian Independence Act, 1947, that "the powers referred to in sub-section (1) of this section extends to the making of laws liimting for the future the powers of the Legislature of the Dominion" Sub-section (1) of Section 6 reads:

> "The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation."

That Section 6(1) included making provision as to the Constitution of the Dominion is made clear by Section 8(1) which provided: "In the case of each of the new Dominions, the powers of legislature of the Dominion, shall for the purpose of making *provision as to the Constitution* of the Dominion be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly." (Emphasis supplied)

166. These provisions of the Indian Independence Act amply demonstrate that when the Constituent Assembly started functoning, it knew, if it acted under the Indian Independence Act, that it could limit the powers of the future Dominion Parliaments.

167. No simlar provisions exists in any of the Independence Acts in respect of other countries, enacted by the British Parliament, e.g., Ceylon Independence Act, 1947, Ghana Independence Act, 1957, Federation of Malaya Independence Act, 1957, Nigeria Independence Act, 1960, Sierra

Leone Independence Act, 1961, Tanganyika Independence Act, 1961, Southern Rhodesia Act, 1965, Jamiaica Independence Act, 1962.

168. I may mention that the aforesaid provisions in the Indian Independence Act were enacted in line with the Cabinet Statement, dated May 16, 1947 and the position of the Congress Party. Para 20[28] of the Statement by the Cabinet Mission provided:

> "The Advisory Committee on the rights of citizens, minorities, and tribal and excluded areas should contain full representation of the interests affected, and their function will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, the clauses for the protection of minorities, and a scheme for the administration of the tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group, or Union Constitution."

169. In clarifying this statement Sir Stafford Cripps at a Press Conference, dated May 16, 1946, stated:

> "But in order to give these minorities and particularly the smaller minorities like the Indian Christians and the Anglo-Indians and also the tribal representatives a better opportunity of influencing minority provisions, we have made provision for the setting up by the constitution making body of an influential advisory Commission which will take the initiative in the preparation of the list of fundamental rights, the minority protection clauses and the proposals for the administration of tribal and excluded areas. This Commission will make its recommendations to the constitution making body and will also suggest at which stage or stages in the Constitution these provisions should be inserted, that is whether in the Union Group or Provincial Constitutions or in any two or more of them." (p. 224, supra)

170. In the letter, dated May 20, 1946, from Maulana Abul Kalam Azad to the Secretary of State, it is stated:

> "The principal point, however, is, as stated above, that we look upon this Constituent Assembly as a sovereign body which can decide as it chooses in regard to any matter before it and can give effect to its decisions. The only limitation we recognise is that in regard to certain major communal issues the decision should be by a majority of each of the two major communities." (P. 251, supra)

171. In his reply, dated May 22, 1946, the Secretary of State observed:

> "When the Constituent Assembly has completed its labours, His Majesty's Government will recommend to Parliament such action as may be necessary for the cession of sovereignty to the Indian people, subject only to two provisos which are mentioned in the statement and which are not, we believe, controversial, *namely, adequate provision for the protection of minorities* and willingness to conclude a treaty to cover matters arising out of the transfer of power." (Emphasis supplied) (p. 252, supra)

172. In the Explanatory statement, dated May 22, 1946, it was again reiterated as follows.

> "When the Constituent Assembly has completed its labours, His

---

[28] *See* Shiva Rao: ***Framing of India's Constitution***, Vol. I, p. 216.

> Majesty's Government will recommend to Parliament such action as may be necessary for the cession of sovereignty to the Indian people, subject only to two matters which are mentioned in the statement and which, *we believe are not controversial, namely adequate provision for the protection of the minorities* (*paragraph 20 of the statement*) and willingness to conclude a treaty with His Majesty's Government to cover matters arising out of the transfer of power (paragraph 22 of the statement). (Emphasis supplied) (p. 258, supra).

173. In pursuance of the above, a resolution for the setting up of an Advisory Committee on fundamental rights was moved by Govind Ballabh Pant, in the Constituent Assembly on January 24, 1947. He laid special importance on the issue of minorities. The Advisory Committee met on February 27, 1947 to constitute various sub-committees including the Minorities Sub-committee. The Sub-committee on Minorities met latter the same day. A questionnire was drafted to enquire about political, economic, religious, educational and cultural safeguards In other words all these safeguards were considered.

174. Divergent views were expressed, and the Minorities sub-committee met on April 17, 18 and 19, 1947 to consider this important matter. At these meetings the Sub-committee considered the interim proposals of the fundamental rights Sub-committee in so far as these had a bearing on minorty rights. These discussions covered such important matters as the prohibition of discrimination on grounds of race, religion, caste, etc.; the abolition of untouchability and the mandatory requirements that the enforcement of any disability arising out of untouchability should be made an offence punishable according to law; freedom to profess, practise and propagate one's religion; the right to establish and maintain institutions for religious and charitable purposes; the right to be governed by one's personal law; the right to use one's mother-tongue and establish denominational communal or language schools, etc.

174-A. Having dealt with the question of fundamental rights for minorities, the Minorities Sub-committee met again on July 21, 1947, to consider the political safeguards for minorities and their representation in the public services.

175. In forwarding the report of the Advisory Committee on the subject of Minority Rights, Sardar Vallabhbhai Patel, in his report, dated August 8, 1947, said:

> "... . It should be treated as supplementary to the one forwarded to you with my letter No, CA/24/Com./47, dated the 23rd April, 1947 and dealt with by the Assembly during the April session. That report dealt with justiciable fundamental right; these rights, whether applicable to all citizens generally or to members of minority communities in particular *offer a most valuable safeguard for minorities over a comprehensive* field of social life. The present report deals with what may broadly be described as political safeguards of minorities and covers the following points: (Emplasis supplied) (p. 411, supra):
>
> (*i*) Representation in Legislature; joint versus separate electorates; and weightage.
>
> (*ii*) Reservation of seats for minorities in Cabinets.
>
> (*iii*) Reservantion for minorities in the public services.

> (*iv*) Administrative machinery to ensure protection of minority rights.''

176. Sardar Patel, while moving the report for consideration on August 27, 1947, said :

> "You will remember that we passed the Fundamental Rights Committee's Report which was sent by the Advisory Committee; the major part of those rights has been disposed of and accepted by this House. They cover a very wide *range of the rights of minorities which give them ample protection*; and yet there are certain political safeguards which have got to be specifically considered. An attempt has been made in this report to enumerate those safeguards which are matters of common knowledge, such as representation in legislatures, that is, joint versus separate electorate.'' (Emphasis supplied) (p. 424, supra)

177. The above proceedings show that the minorities were particularly concerned with the fundamental rights which were the subject-matter of discussion by the Fundamental Rights Committee.

178. The above brief summary of the work of the Advisory Committee and the Minorities Sub-committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution'' as empowering Parliament to abrogate the rights of minorities.

179 Both sides relied on the speeches made in the Constituent Assembly. It is, however, a sound rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any provisions of the statute. The same rule has been applied to the provisions of this Constitution by this Court in *State of Travancore-Cochin and Others* v. *Bombay Co. Ltd.*[29] Shastri, C. J., speaking for the Court observed :

> " It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates, on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpetation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes—see *Administrator-General of Bengal* v. *Prem Nath Mallick*[30] The reason behind the rule was explained by one of us in *Gopalan's case*[31] thus :
>
> "A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote

---

[29] 1952 SCR 1112, 1121 : AIR 1952 SC 366 : 1952 SCJ 527.

[30] (1895) 22 IA 107-118.

[31] 1950 SCR 88 : AIR 1950 SC 27 : 1950 SCJ 174.

> which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,"

or, as is it more tersely put in an American case:

> "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other—*United States* v. *Trans-Missouri Freight Association.*"
>
> "This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in Canada and Australia—see *Craies on Statute Law, 5th* Ed. p. 122."

180. In *Golak Nath's case*,[32] Subba Rao, C. J., referred to certain portions of the speeches made by Pandit Nehru and Dr. Ambedkar but he made it clear at p. 792 that he referred to these speeches "not with a view to interpret the provisions of Article 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution". Bachawat, J., at p. 922 observed:

> "Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution. These speeches cannot be used as aids for interpreting the Constitution, see *State of Travancore-Cochin and Others* v. *Bombay Co. Ltd*[33] Accordingly I do not rely on them as aids to construction. But I propose to refer to them, as Shri A. K. Sen relied heavily on the speeches of Dr. B. R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches ...."

181. In *H.H. Maharajadhiraja Madhadev Rao* v. *Union of India*,[34] Shah, J., in the course of the judgment made a brief reference to what was said by the Minister of Home Affairs, who was incharge of the States, when he moved for the adoption of Article 291. He referred to this portion of the speech for the purpose of showing the historical background and the circumstances which necessitated giving certain guarantees to the former rulers.

182. It is true that Mitter, J., in the dissenting judgment, at p. 121, used the debates for the purposes of interpreting Article 363 but he did not discuss the point whether it is permissible to do so or not.

183. In *Union of India* v. *H S. Dhillon*,[35] I, on behalf of the majority, before referring to the speeches observed at p. 58 that "we are however, glad to find from the following extracts from the debates that our interpretation accords with what was intended". There is no harm in finding confirmation of one's interpretation in debates but it is quite a different thing to interpret the provisions of the Constitution in the light of the debates.

184. There is an additional reason for not referring to debates for the purpose of interpretation. The Constitution, as far as most of the Indian States were concerned, came into operation only because of the acceptance by the Ruler or Rajpramukh. This is borne out by the following extract from the statement of Sardar Vallabhbhai Patel in the Constituent Assembly on October 12, 1949, (C. A. D., Vol. X, pp. 161-163):

---

[32] (1967) 2 SCR 762, 792, 922: AIR 1967 SC 1643: (1967) 2 SCJ 486.

[33] 1952 SCR 1112: AIR 1952 SC 366: 1952 SCJ 527.

[34] (1971) 3 SCR 9: (1971) 1 SCC 85.

[35] (1972) 2 SCR 33.

> "Unfortunately we have no properly constituted Legislatures in the rest of the States (apart from Mysore, Saurashtra and Travancore and Cochin Union) nor will it be possible to have Legislatures constituted in them before the Constitution of India emerges in its final form. We have, therefore, no option but to make the Constitution operative in these States on the basis of its acceptance by the Rulers or the Rajpramukh, as the case may be, who will no doubt consult his Council of Ministers."

185. In accordance with this statement, declarations were issued by the Rulers or Rajpramukhs accepting the Constitution.

186. It seems to me that when a Ruler or Rajpramukh or the people of the State accepted the Constitution of India in its final form, he did not accept it subject to the speeches made during the Constituent Assembly debates. The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people.[36]

187. In this connection reference was made to Article 305 of the draft Constitution which provided that notwithstanding anything contained in Article 304 of the Constitution, the provisions of the Constitution relating to the reservation of seats for the Muslims, etc., shall not be amended during the period of ten years from the commencement of the Constitution. Although this draft of Article 305 has no counterpart, it was sought to be urged that this showed that every provision of the Constitution was liable to be amended. I have come to the conclusion that every provision is liable to be amended subject to certain limitations and this argument does not affect my conclusion as to implied limitations.

188. A very important decision of the Judicial Committee of the Privy Council in *The Bribery Commissioner* v. *Pedrick Ranasinghe*[37] throws considerable light on the topic under discussion. The import of this decision was not realised by this Court in *Golak Nath's case.*[38] Indeed, it is not referred to by the minority in its judgments, and Subba Rao, C. J., makes only a passing reference to it. In order to fully appreciate the decision of Privy Council it is necessary to set out the relevant provisions of the Ceylon Independence Order in Council, 1947, hereinafter referred to as the Ceylon Constitution.

189. Part III of the Ceylon Constitution deals with "Legislature". Section 7 provides that "there shall be a Parliament of the Island which shall consist of His Majesty, and two Chambers to be known respectively as the Senate and the House of Representatives".

189-A. Section 18 deals with voting. It reads:

> "18. Save as otherwise provided in sub-section (4) of Section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. The President or Speaker or other person

---

[36] See *In re The Regulation and Control of Aeronautics in Canada,* 1932 AC 54 at 78.

[37] 1965 AC 172.

[38] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

> residing shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes."

190. Section 29 deals with the power of Parliament to make laws. It reads:

> "29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall—
>
> (*a*) prohibit or restrict the free exercise of any religion; or
>
> (*b*) make persons of any community or religion liable to disabilities or restrictions to which persons or other communities or religions are not made liable; or
>
> (*c*) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
>
> (*d*) alter the constitution of any religious body except with the consent of the governing authority of that body. So, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:
>
> Provided, however, that the preceding provisions of this sub-section shall not apply to any law making provision for, relating to, or connected with the, election of Members of the House of Representatives, to represent persons registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship Act).
>
> This proviso shall cease to have effect on a date to be fixed by the Governor-General by Proclamation published in the Gazette.
>
> (3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void.
>
> (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a Certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).
>
> Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law."

191. According to Mr. Palkhivala, Section 29(1) corresponds to Arrticles 244 and 245, and Section 29(4) corresponds to Article 368 of our Constitution, and Section 29(2) and 29(3) correspond to Article 13(2) of our Constitution, read with fundamental rights.

192. The question which arose before the Judicial Committee of the Privy Council was whether Section 41 of the Bribery Amendment Act, 1958 contravened Section 29(4) of the Ceylon Constitution, and was consequently invalid. The question arose out of the following facts. The respondent, Ranasinghe was prosecuted for a bribery offence before the Bribery Tribunal created by the Bribery Amendment Act, 1958. The Tribunal sentenced him to a term of imprisonment and fine. The Supreme Court on appeal declared the conviction and orders made against him null and inoperative on the ground that the persons composing the Tribunlal were not validly appointed to the Tribunal.

193. Section 62 of the Ceylon Constitution provided for the appointment of the Chief Justice and Puisne Judges of the Supreme Court. Section 53 dealt with the setting up of the Judicial Service Commission, consisting of the Chief Justice, a Judge of the Supreme Court, and one other person who shall be, or shall have been, a Judge of the Supreme Court. It further provided that no person shall be appointed as, or shall remain, a member of the Judicial Service Commission, if he is a Senator or a Member of Parliament. Section 55 provided for the appointment of other Judicial Officers. Section 55(1), reads:

> "55. (1) The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission."

194. The Judicial Committee deduced from these provisions thus:

> "Thus there is secured a freedom from political control, and it is a punishable offence to attempt directly or indirectly to influence any decision of the Commission (Section 56)" (p. 190)

195. The Judicial Committee then describe the position of the Bribery Tribunal as follows:

> "A bribery tribunal, of which there may be any number, is composed of three members selected from a panel (Section 42). The panel is composed of not more than 15 persons who are appoined by the Governor-General on the advice of the Minister of Justice (Section 41). The Members of the panel are paid remuneration (Section 45)." (p. 192)

196. The Judicial Committee held that the members of the Tribunal held judicial office and were judicial officers within Section 55 of the Ceylon Constitution. They found that there was a plain conflict between Section 55 of the Constitution and Section 41 of the Bribery Amendment Act under which the panel was appointed.

197. Then the Judicial Committee examined the effect of this conflict. After setting out Section 18, Section 29(1) and Section 29(2)(*a*), the Judicial Committee observed:

> "There follow (*b*), (*c*) and (*d*), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. *They represent the solemn balance of rights, between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are, therefore unalterable under the Constitution.*" (Emphasis supplied) (p. 193)

198. After making these observations, the Judicial Committee set out sub-sections (3) and (4) of Section 29 of the Ceylon Constitution. The observations, which I have set out above, are strongly relied on by

Mr. Palkhivala in support of his argument that Part III similarly entrenched various religious and racial and other matters and these represented solemn balance of rights between the citizens of India, the fundamental conditions on which inter se they accepted the Constitution of India and these are, therefore, unalterable under the Constitution of India.

199. Mr. Seervai, in reply, submitted that the word "entrenched" meant nothing else that than these provisions were subject to be amended only by the procedure prescribed in Section 29(4) of the Ceylon Constitution. But I am unable to accept this interpretation because in that sense other provisions of the Constitution were equally entrenched because no provision of the Ceylon Constitution could be amended without following the procedure laid down in Section 29(4).

200. The interpretation urged by Mr. Palkhivala derives support in the manner the Judicial Committee distinguished *McCawley's case* (infra). *McCawley* v. *The King*,[39] I may set out here the observations of the Judicial Committee regarding *McCawley's case* (supra). They observed:

> "It is possible now to state summarily what is the essential difference between the *McCawley's case* (supra) and this case. There the Legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which *was neither fundamental in the sense of being beyond change* nor so constructed as to require any special legislative process to pass upon the topic dealt with. (Emphasis supplied) (p. 198)

201. It is rightly urged that the expression "which was neither fundamental in the sense of being beyond change" has reference to Section 29(2) of the Ceylon Constitution. I have no doubt that the Judicial Committee held that the provisions of Section 29(2) in the Ceylon Constitution were unamendable. I may mention that Prof. S. A. De'Smith in reviewing the book "*Reflections on the Constitution and the Constituent Assembly* (*Ceylon's Constitution*)" by L. J. M. Cooray, reads the *obiter dicta* in *Bribery Commissioner* v. *Ranasinghe*,[40] indicating that certain provisions of the Constitution were unalterable by the prescribed amending procedure.

202. It may be that these observations are obiter but these deserve our careful consideration, coming as they do from the Judicial Committee.

203. Why did the Judical Committee say that the provisions of Section 29(2) were "unalterable under the Constitution" or "fundamental in the sense of being beyond change"? There is nothing in the language of Section 29(4) to indicate any limitations on the power of the Ceylon Parliament. It could "amend or repeal" any provision of the Constitution, which included Section 29(2) and Section 29(4) itself. The reason could only be an implied limitation on the power to amend under Section 29(4) deducible from "the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution". Unless there was implied a limitation on the exercise of the amending power under Section 29(4), Section 29(4) could itself be amended to make it clear that Section 29(2) is amendable.

---

[39] 1920 AC 691.

[40] 1965 AC 172, 193-194.

204. This case furnishes an exact example where implied limitations on the power to amend the Constitution have been inferred by no less a body than Judicial Committee of the Privy Council.

205. Mr. Seervai relied on the portion within brackets of the following passage at pp. 197-198;

> "These passages show clearly that the Board in *McCawley's case* (supra) took the view which commends itself to the Board in the present case, that (a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law. This restriction exists independently of the question whether the Legislature is sovereign, as is the Legislature of Ceylon, or whether the Constitution is 'uncontrolled', as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the Legislature, if the regulating instrument so provides that if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions.) But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process And this is the proposition which is in reality involved in the argument."

206. The portion, not within brackets, which has been omitted in Mr. Seervai's written submissions, clearly shows that the Judicial Committee in this passage was not dealing with the amendment of Section 29(2) of the Ceylon Constitution and had understood *McCawley's case* (supra) as not being concerned with the question of the amendment of a provision like Section 29(2) of the Ceylon Constitution. This passage only means that a legislature cannot disregard the procedural conditions imposed on it by the constituent instrument prescribing a particular majority but may amend them if the constituent instrument gives that power.

207. The next passage, a part of which I have already extracted, which deals with the difference between *McCawley's case* and *Ranasinghe's case* (supra) shows that the Judicial Committee in the passage relied on was dealing with the procedural part of Section 29(4) of Ceylon Constitution. It reads:

> "It is possible now to state summarily what is the essential difference between the *McCawley's case* (supra) and this case. There the Legislature having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of the Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law 'which being in conflict with Section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the

---

41. 1920 AC 691.

42. 1965 AC 172, 193-194.

appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in Section 29(4), the Ceylon Legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland Legislature was found to have under Section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its Section 9, namely compelled to operate a special procedure in order to achieve the desired result." (p. 198)

208. I may mention that the Judicial Committee while interpreting the British North America Act, 1867 had also kept in mind the preservation of the rights of minorities for they say *In re The Regulation and Control of Aeronautics in Canada*:[43] "inasmuch as the Act (The British North America Act) embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of Sections 91 and 92 should impose a new and different contract upon the federating bodies".

209. The words of the Judicial Committee in *Ranasinghe's case* (supra), are opposite and pregnant. "They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and these are, therefore, unalterable under the Constitution". It is true that the Judicial Committee in the context of minorities and religious rights in Ceylon used the word "unalterable". But the Indian context is slightly different. The guarantee of fundamental rights extends to numerous rights and it could not have been intended that all of them would remain complelty unalterable even if Article 13(2) of the Constitution be taken to include constitutional amendments. A mere reasonable inference to be drawn from the whole scheme of the Constitution is that some other meaning of "Amendment" is most appropriate. This conclusion is also reinforced by the concession of the Attorney-General and Mr. Seervai that the whole Constitution cannot be abrogated or repealed and a new one substituted. In other words, the expression 'Amendment of this Constitution" does not include a revision of the whole Constitution. If this is true—I say that the concession was rightly made—then which is that meaning of the word "Amendment" that is most appropriate and fits in with the while scheme of the Constitution. In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.

210. I come to the same conclusion by another line of reasoning In a written constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution. I will mention a few instances approved by the Judicial Committee and this Court and other courts. I may first consider the doctrine that enables

---

[43] 1932 AC 54 at 70.

Parliament to have power to deal with ancillary and subsidiary matters, which strictly do not fall within the legislative entry with respect to which legislation is being undertaken.

211. Lefroy in "*A short Treatise on Canadian Constitutional Law*" (page 94) puts the matter thus:

> "But when it is (Dominion Parliament) is legislating upon the enumerated Dominion subject-matters of Section 91 of the Federation Act, it is held that the Imperial Parliament, by necessary implication, intended to confer on it legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures under Section 92, so far as a general law relating to those subjects may effect them, as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. The Privy Council has established and illustrated this in many decisions."

212. This acts as a corresponding limitation on the legislative power of the Provincial or State legislatures.

213. This Court has in numerous decisions implied similar powers. (See *Orient Paper Mills* v. *State of Orissa*;[44] *Burmah Construction Co.* v. *State of Orissa*,[45] *Navnit Lal Javeri* v. *Appellate Assistant Commissioner*,[46] to mention a few).

214. It often happens that what has been implied by courts in one constitution is expressly conferred in another constitution. For instance, in the Constitution of the United States, clause 18 of Section 8 expressly grants incidental power:

> "The Congress shall have power.........to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

215. It would not be legitimate to argue from the above express provision in the United States Constitution that if the Constitution-makers wanted to give such powers to the Parliament of India they would have expressly conferred incidental powers.

216. Story says that clause 18 imports no more than would result from necessary implication (see pp. 112 and 113, Vol. 3) if it had not been expressly inserted.

217. In *Ram Jawaya Kapur* v. *State of Punjab*,[47] this Court implied that "the President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh.............."

218. In *Sanjeevi Naidu* v. *State of Madras*,[48] Hegde, J., held that the Governor was essentially a constitutional head and the administration of State was run by the Council of Ministers.

---

[44] (1962) 1 SCR 549: AIR 1961 SC 1438: (1961) 2 SCJ 610.

[45] 1962 Supp 1 SCR 242: AIR 1962 SC 1320: (1962) 2 SCJ 148.

[46] AIR 1965 SC 1375: (1965) 1 SCR 909: (1965) 2 SCJ 160.

[47] (1955) 2 SCR 225, 236-37: AIR 1955 SC 549: 1955 SCJ 504.

[48] (1970) 1 SCC 443.

219. Both these cases were followed by another constitution bench in *U. N. R. Rao* v. *Smt. Indira Gandhi*.[49]

220. This conclusion constitutes an implied limitation on the powers of the President and the Governors. The Court further implied in *Ram Jawaya Kapur's case*,[50] that the Government could without specific legislative sanction carry on trade and business.

221. To save time we did not hear Mr. Seervai on the last 3 cases just cited. I have mentioned them only to give another example.

222. It may be noted that what was implied regarding carrying on trade was made an express provision in the Constitution by the Constitution (Seventh Amendment) Act, 1956, when a new Article 298 was substituted. The Federal Court and the Supreme Court of India have recognised and applied this principle in other cases—

"(*i*) A grant of the power in general terms standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the *implications* of the context, and even by considerations arising out of what appears to be the general scheme of the Act." (Per Gwyer, C. J., *The C. P. & Berar Act*—1939 FCR 18 at 42 : AIR 1939 FC 1).

(*ii*) Before its amendment in 1955, Article 31(2) was read as containing an implied limitation that the State could acquire only for a public purpose (the Fourth Amendment expressly enacted this limitation in 1955)—

(*a*) "One limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for public purpose". (Per Mukherjea, J. *Chiranjitlal Chowdhuri* v. *Union of India*—1950 SCR 869 at 902 : AIR 1951 SC 41 : 1951 SCJ 29).

(*b*) "The existence of a 'public purpose' is undoubtedly an implied condition of the exercise of compulsory powers of acquisition by the State........." (Per Mahajan, J. *State of Bihar* v. *Maharajadhiraja of Darbhanga*—1952 SCR 889 at 934 : AIR 1952 SC 252 : 1952 SCJ 354).

(*iii*) The Supreme Court has laid down that there is an implied limitation on legislative power: the Legislature cannot delegate the essentials of the legislative functions—

"......the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct......the *limits* of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be *implied* in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete" (Per Mukherjea, J., *In re The Delhi Laws Act*—1951 SCR 747 at 984-5 : AIR 1951 SC 332 : 1951 SCJ 527.)

---

[49] (1971) 2 SCC 63.

[50] (1955) 2 SCR 225 : AIR 1955 SC 549 : 1955 SCJ 504.

The same implied limitation in the Legislature, in the field of delegation, has been invoked and applied in:

Raj Narian Singh v. *Patna Administration*, (1955) 1 SCR 290: AIR 1954 SC 569: 1954 SCJ 661;

Hari Shanker Bagla v. *State of Madhya Pradesh*, (1955) 1 SCR 380: AIR 1954 SC 465: 1954 SCJ 637;

Vasantilal Sanjanwala v. *State of Bombay*, (1961) 1 SCR 341: AIR 1961 SC 4: (1961) 1 SCJ 395;

The Municipal Corporation of Delhi v. *Birla Cotton Mills*, (1968) 3 SCR 251: AIR 1968 SC 1232: (1969) 1 SCJ 621;

D. S. Garewal v. *State of Punjab*, 1959 Supp 1 SCR 792: AIR 1959 SC 512: 1959 SCJ 399.

(*iv*) On the power conferred by Articles 3 and 4 of the Constitution to form a new State and amend the Constitution for that purpose limitation has been implied that the new State must—

> "*conform to the democratic pattern* envisaged by the Constitution; and the power which the Parliament may exercise......... is *not the power to over-ride the constitutional scheme*. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs." [Per Shah, J.—*Mangal Singh* v. *Union of India*, (1967) 2 SCR 109 at 112: AIR 1967 SC 944 (1968) 1 SCJ 240] (Emphasis supplied).

223. It would have been unnecessary to refer to more authorities but for the fact that it was strenuously urged that there could not be any implied limitations resulting from the scheme of the Constitution.

224. Before referring to a recent decision of the Australian High Court, observations in certain earlier cases may be reproduced here:

> "Since the *Engineers case*, (1920) 28 CLR 129, a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments, a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' case* (supra) meant to propound such a doctrine". [Per Dixon, J., *West* v. *Commissioner of Taxation (New South Wales)*, 56 CLR 657 at 681-2].
>
> "Some *implications* are necessary from the structure of the Constitution itself, but it is inevitable also, I should think, that these implications can only be defined by a gradual process of judicial decision." (Per Starke, J., *South Australia* v. *Commonwealth*, 65 CLR 373, 447. (Emphasis supplied).
>
> "The Federal character of the Australian Constitution carries *implication of its own*...............Therefore it is beyond the power of either to abolish or destroy the other." (Per Starke, J. *Melbourne Corporation* v. *Commonwealth*, 74 CLR 31 at 70). (Emphasis supplied).
>
> "The Federal system itself is the foundation of the restraint upon the use of the power to control the States......Restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent

exercise of the functions of the one or the other……… ..” (Per Dixon, J. —*Melbourne Corporation* v. *Commonwealth,* 74 CLR 31 at 81-2).

225. I may now refer to *State of Victoria* v. *The Commonwealth,*[51] which discusses the question of implications to be drawn from a constitution like the Australian Constitution which is contained in the Commonwealth Act. It gives the latest view of that court on the subject.

226. The point at issue was whether the Commonwealth Parliament, in the exercise of its power under Section 51(*ii*) of the Constitution (subject to the Constitution, to make laws with respect to taxation, but so as not to discriminate between States or parts of States) may include the Crown in right of a State in the operation of a law imposing a tax or providing for the assessment of a tax.

227. Another point at issue was the status of the Commonwealth and the States under the Constitution, and the extent to which the Commonwealth Parliament may pass laws binding on the States, considered generally and historically, and with particular reference to the question whether there is any implied limitation on Commonwealth legislative power. It is the discussion on the latter question that is relevant to the present case.

228. There was difference of opinion among the Judges. Chief Justice Barwick held as follows:

> “The basic principles of construction of the Constitution were definitively enunciated by the Court in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.,* (1920) 28 CLR 129, (the *Engineers' case*) Lord Selborne's language in *Reg* v. *Burah,* (1878) 3 App Cas 889 at pp. 904-905, was accepted and applied as was that of Earl Loreburn in *Attorney-General for Ontario* v. *Attorney-General far Canada,* (1912) AC at 583.”

229. According to the Chief Justice, the Court in *Engineer's case* (supra) unequivocally rejected the doctrine that there was an “implied prohibition” in the Constitution against the exercise in relation to a State of legislative power of the Commonwealth once ascertained in accordance with the ordinary rules of construction, a doctrine which had theretofore been entertained and sought to be founded upon some supposed necessity of “protection”, as it were, “against the aggression of some outside and possibly hostile body”. The Court emphasized that if protection against an abuse of powers were needed, it must be provided by the electorate and not by the judiciary. “The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it and then *lucet ipsa per se*” (p. 253).

230. Now this is the judgment which is relied on by Mr. Seervai and the learned Attorney-General. On the other hand, reliance is placed by Mr. Palkhivala on Menzies, J.'s judgment:

> “Does the fact that the Constitution is ‘federal’ carry with it implications limiting the law-making powers of the Parliament of the Commonwealth with regard to the States?

---

[51] (1971) 45 ALRJ 251, 252, 253.

To this question I have no doubt, both on principle and on authority, that an affirmative answer must be given. A constitution providing for an indissoluble federal Commonwealth must protect both Commonwealth and States. The States are not outside the Constitution. They are States of the Commonwealth; Section 106. Accordingly, although the Constitution does, clearly enough, subject the States to laws made by the Parliament, it does so with some limitation.'' (p. 262)

231. After making these observations, the learned Judge examined authorities and he found support in *Melbourne Corporation v. The Commonwealth.*[52] He then examined various other cases in support of the above principles.

232. The other passages relied on by the petitioners from the judgments of the other learned Judges on the Bench in that case are as follows:

Windeyer, J.:

> ''In each case an implication means that something not expressed is to be understood. But in the one case, this involves an addition to what is expressed: in the other it explains, perhaps limits, the effect of what is expressed. It is in the latter sense that in my view of the matter, implications have a place in the interpretation of the Constitution: and I consider it is the sense that Dixon, J. intended when in *Australian National Airways Pty. Ltd.* v. *The Commonwealth*, (1945) 71 CLR 29, he said (at p. 85): 'We should avoid pedantic and narrow constructions in dealing with an instrument of Government and I do not see why we should be fearful about making implications''. His Honour, when Chief Justice, repeated this observation in *Lamshed* v. *Lake*, (1958) 99 CLR 132 at p. 144. I said in *Spratt* v. *Hermes*, (1965) 114 CLR 226 at p. 272, that it is well to remember it. I still think so. The only amendation that I would venture is that I would prefer not to say 'making implications'', because our avowed task is simply the revealing or uncovering of implications that are already there.
>
> In *Melbourne Corporation* v. *The Commonwealth*, (1947) 74 CLR 31, Starke, J. said (at p. 70): ''The federal character of the Australian Constitution carries implications of its own''.........(p. 268).
>
> * * * * *
>
> ''The position that I take is this: The several subject-matters with respect to which the Commonwealth is empowered by the Constitution to make laws for the peace, order and good government of the Commonwealth are not to be narrowed or limited by implications. Their scope and amplitude depend simply on the words by which they are expressed. But implications arising from the existence of the States as parts of the Commonwealth and as constituents of the federation may restrict the manner in which the Parliament can lawfully exercise its power to make laws with respect to a particular subject-matter. These implications, or perhaps it were better to say underlying assumptions of the Constitution, relate to the use of a power not to the inherent nature of the subject-matter of the law. Of course whether or not a law promotes peace, order and good Government is for the Parliament, not for a court, to decide. But a law, although it be with respect to a designated subject-matter, cannot be for the peace, order and good government of the

---

[52] (1947) 74 CLR 31.

Commonwealth if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth."... .. ..(p. 269).

* * * * *

Gibbs, J. * * * *

"The ordinary principles of statutory construction do not preclude the making of implications when these are necessary to give effect to the intention of the Legislature as revealed in the statute as a whole. The intention of the Imperial Legislature in enacting the Constitution Act was to give effect to the wish of the Australian people to join in a federal union and the purpose of the Constitution was to establish a federal, and not a unitary, system for the Government of Australia and accordingly to provide for the distribution of the powers of Government between the Commonwealth and the States who were to be the constituent members of the federation. In some respects the Commonwealth was placed in a position of supremacy, as the national interest required, but it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves. Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other." (p. 275)

233. Wynes[53] in discussing the amendment of the Constitutions of the States of Australia sums up the position thus. I may refer only to the propositions which are relevant to our case:

(1) Every State Legislature has by virtue of Section 5 full powers of amendment of any provision respecting its constitution, powers and procedures;

(2) But it cannot (*semble*) alter its "representative" character;

(3) The "Constitution" of a Legislature means its composition, form or nature of the House or Houses, and excludes any reference to the Crown;

* * * * *

(6) No Colonial Legislature can forever abrogate its power of amendment and thereby render its Constitution absolutely immutable. A law purporting to effect this object would be void under Section 2 of the Act as being repugnant to Section 5 thereof.

234. For proposition (2) above, reference is made in the footnote to *Taylor* v. *The Attorney-General of Queensland.*[54] The relevant passages which bear out the second proposition are:

"I take the constitution of a Legislature, as the term is here used, to mean the composition, form or nature of the House of Legislature where there is only one House, or of either House if the legislative body

---

[53] Wynes: *Legislative, Executive and Judicial Power in Australia*, Fourth Ed., p. 503.

[54] 23 CAR 457.

> consists of two Houses. Probably the power does not extend to authorize the elimination of the representative character of the Legislature within the meaning of the Act. (p. 468—per Barton, J.)
>
> I read the words 'constitution of such Legislature' as including the change from a unicameral to a bicameral system, or the reverse. Probably the 'representative' character of the Legislature is a basic condition of the power relied on, and is preserved by the word 'such', but, that being maintained, I can see no reason for cutting down the plain natural meaning of the words in question so as to exclude the power of a self-governing community to say that for State purposes one House is sufficient as its organ of legislation." (p. 474—per Isaacs, J.)

(For proposition No. 3, see *Taylor* v. *The Attorney-General of Queensland*[55] and *Clayton* v. *Heffron*.[56])

235. Then dealing with the Commonwealth Constitution, he states:

> "Another suggested limitation is based upon the distinction between the covering sections of the Constitution Act and the Constitution itself; it is admitted on all sides that Section 128 does not permit of any amendment to those sections. (And in this respect the statute of Westminster does not confer any new power of amendment—indeed it is expressly provided that nothing in the statute shall be deemed to confer any power to repeal or alter the Constitution of the Constitution Act otherwise than in accordance with existing law). In virtue of their character of Imperial enactments the covering sections of the Constitution are alterable only bv the Imperial Parliament itself. The question is, admitting this principle, how far does the Constitution Act operate as a limitation upon the amending power? It has been suggested that any amendment which would be inconsistent with the preamble of the Act referring to the 'indissoluble' character and the sections which refer to the 'Federal' nature of the Constitution, would be invalid. There has been much conflict of opinion respecting this matter; the view here taken is that the preamble in no wise effects the power of alteration." (p. 505).

236. In view of this conflict, no assistance can be derived from academic writing.

237. The case of *The Attorney-General of Nova Scotia* and *The Attorney-General of Canada* and *Lord Nelson Hotel Company Limited*,[57] furnishes another example where limitations were implied. The Legislature of the Province of Nova Scotia contemplated passing an Act respecting the delegation of jurisdiction of the Parliament of Canada to the Legislature of Nova Scotia and vice versa. The question arose whether, if enacted, the bill would be constitutionally valid since it contemplated delegation by Parliament of powers, exclusively vested in it by Section 91 of the British North America Act to the Legislature of Nova Scotia, and delegation by that Legislature of powers, exclusively vested in Provincial Legislatures under Section 92 of the Act, to Parliament.

238. The decision of the Court is summarised in the headnote as follows:

> "The Parliament of Canada and each Provincial Legislature is a

---

[55] 23 CAR 457.

[56] (1960) 105 CLR 214, 251.

[57] 1951 SCR (31) Canada.

> sovereign body within the sphere, possessed of exclusive jurisdiction to legislate with regard to the subject-matters assigned to it under Section 91 or Section 92, as the case may be. Neither is capable therefore of delegating to the other the powers with which it has been vested nor of receiving from the other the powers with which the other has been vested."

The Chief Justice observed:

> "The Constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by Section 91 and that each Province can legislate exclusively on the subject-matters referred to it by Section 92." (p. 34)

He further observed:

> "Under the scheme of the British North America Act there were to be, in the words of Lord Atkin in [*The Labour Conventions Reference*, (1937) AC 326], 'Watertight compartments which are an essential part of the original structure." (p. 34)

239. He distinguished the cases of *In re Grey*[58] and *The Chemical Reference*,[59] by observing that delegations such as were dealt with in these cases were "delegations to a body subordinate to Parliament and were of a character different from the delegations meant by the Bill now submitted to the Court".

240. Kerwin, J., referred to the reasons of their Lordships in *In re The Initiative and Referendum Act*,[60] as instructive. After referring to the actual decision of that case, he referred to the observations of Lord Haldane, which I have set out later while dealing with the *Initiative and Referendum case* and then held:

> "The British North America Act divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division." (p. 38)

Taschereau, J., observed:

> "It is a well-settled proposition of law that jurisdiction cannot be conferred by consent. None of these bodies can be vested directly or indirectly with powers which have been denied them by the B. N. A. Act, and which therefore are not within their constitutional jurisdiction." (p. 40)

241. He referred to a number of authorities which held that neither the Dominion nor the Province can delegate to each other powers they do not expressly possess under the British North America Act. He distinguished cases like *Hodge* v. *The Queen*,[61] *In Re Gray*,[62] *Shannon* v. *Lower Mainland Dairy Products Board*,[63] and *Chemicals Reference*,[64] by observing:

> "In all these cases of delegation, the authority delegated its powers

---

[58] (1918) 57 Canada SCR 150.
[59] 1943 SCR 1 Canada.
[60] 1919 AC 935.
[61] (1883) 9 App Cas 117.
[62] 57 Canada SCR 150.
[63] 1938 AC 708.
[64] 1943 SCR 1 Canada.

> to subordinate Boards for the purpose of carrying legislative enactments into operation." (p. 43)

242. Justice Rand emphasized that delegation implies subordination and subordination implies duty.

243. Justice Fauteux, as he then was, first referred to the following observations of Lord Atkin in *Attorney-General for Canada* v. *Attorney-General for Ontario*:[65]

> "No one can doubt that this distribution (of powers) is one of the most essential conditions, probably the most essential condition, in the interprovincial compact to which the British North America Act gives effect."

He then observed:

> "In the result, each of the provinces, enjoying up to the time of the union, within their respective areas, and quoad one another, an independent, exclusive and overall legislative authority, surrendered to and charged the Parliament of Canada with the responsibility and authority to make laws with respect to what was then considered as matters of common interest to the whole country and retained and undertook to be charged with the responsibility and authority to make laws with respect to local matters in their respective sections. This is the system of government by which the Fathers of Confederation intended—and their intentions were implemented in the Act—to 'protect the diversified interests of the several provinces and secure the efficiency, harmony and permanency in the working of the union." (p. 56)

244. In the case just referred to, the Supreme Court of Canada implied a limitation on the power of Parliament and the Legislatures of the Provinces to delegate legislative power to the other although there was no express limitation, in terms, in Sections 91 and 92 of the Canadian Constitution. This case also brings out the point that delegation of law-making power can only be to a subordinate body. Applying the ratio of this decision to the present case, it cannot be said that the State Legislatures or Parliament acting in its ordinary legislative capacity, are subordinate bodies to Parliament acting under Article 368 of the Constitution. Therefore it is impermissible for Parliament under Article 368 to delegate its functions of amending the constitution to either the State Legislatures or to its ordinary legislative capacity. But I will refer to this aspect in greater detail later when I refer to the case in the *Initiative and Referendum Act*.

245. In Canada some of the Judges have implied that freedom of speech and freedom of the Press cannot be abrogated by Parliament or Provincial Legislatures from the words in the Preamble to the Canadian Constitution, i. e. "with a Constitution similar in principle to that of the United Kingdom". Some of these observations are:

> "Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate." (Per Abbot, J. *Switzmen* v. *Elbling*, 1957 Can SC 285 at 328).

---

[65] 1937 AC 326, 351.

> "I conclude further that the opening paragraph of the preamble to the B. N. A. Act, 1867 which provided for a 'Constitution similar in principle to that of the United Kingdom', thereby adopted the same constitutional principles and hence Section 1025-A is contrary to the Canadian Constitution, and beyond the competence of Parliament or any provincial Legislature to enact so long as our Constitution remains in its present form of a constitutional democracy." [Per O'Halloran, J. A.—*Rex* v. *Hess,* (1949) 4 DLR 199 at 208].
>
> "*In re Alberta Legislation*, (1938) 2 DLR 81, SCR 100, Sir Lyman P. Duff C. J. C. deals with this matter. The proposed legislation did not attempt to prevent discussion of affairs in newspapers but rather to compel the publication of statements as to the true and exact objects of governmental policy and as to the difficulties of achieving them. Quoting the words of Lord Wright M. R. in *James* v. *Commonwealth of Australia*, 1936 AC 578 at p. 627 freedom of discussion means" 'freedom governed by law' he says at p. 107 DLR, p. 133 SCR: "It is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.
>
> He deduces authority to protect it from the principle that the *powers requisite for the preservation of the Constitution arise by a necessary implication of the Confederation Act as a whole.*" (Per Rand, J., *Samur* v. *City of Quebec*, (1953) 4 DLR 641 at 671]. (Emphasis supplied).

246. It is, however, noteworthy that the Solicitor-General appearing on behalf of the Union of India conceded that implications can arise from a Constitution but said that no implication necessarily arises out of the provisions of Article 368.

247. I may now refer to another decision of the Judicial Committee in *Liyange's case*,[66] which was relied on by Mr. Seervai to show that an amendment of the Constitution cannot be held to be void on the ground of repugnancy to some vague ground of inconsistency with the preamble.

248. The Parliament of Ceylon effected various modifications of the Criminal Procedure Code by the Criminal Law (Special Provisions) Act, 1962. The appellants were convicted by the Supreme Court of Ceylon for various offences like conspiring to wage war against the Queen, etc.

The two relevant arguments were:

> "The first is that the Ceylon Parliament is limited by an inability to pass legislation which is contrary to fundamental principles of justice. The 1962 Acts, it is said, are contrary to such principles in that they not only are directed against individuals but also ex post facto create crimes and punishments, and destroy fair safeguards by which those individuals would otherwise be protected.
>
> The appellants' second contention is that the 1962 Acts offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted as unjustifiable assumption of judicial power by the Legislature, or an interference with judicial power, which is outside the Legislature's competence and

---

[66] (1967) 1 AC 259.

> is inconsistent with the severance of power between Legislature, executive, and judiciary which the Constitution ordains." (p. 283)

249. Mr. Seervai relies on the answer to the first contention. According to Mr. Seervai, the answer shows that constituent power is different from legislative power and when constituent power is given, it is exhaustive leaving nothing uncovered.

250. The Judicial Committee after referring to passages from "*The Sovereignty of the British Dominions*" by Prof. Keith, and *The Statutes of Westminster and Dominion Status*" by K. C. Wheare, observed at page 284:

> "Their Lordships cannot accept the view that the legislature while removing the fetter of repugnance to English law, left in existence a fetter of repugnance to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words 'but not otherwise' in Section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy .. .. .."

251. The Judicial Committee referred to the Ceylon Independence Act, 1947, and the Legislative Power of Ceylon and observed:

> "These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order in Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State (see *Ibralebbe* v. *The Queen*—(1964) AC 900."

252. Mr. Seervai sought to argue from this that similarly the amending power of Parliament under Article 368 has no limitations and cannot be limited by some vague doctrine of repugnancy to natural and inalienable rights and the Preamble. We are unable to appreciate that any analogy exists between Mr. Palkhivala's argument and the argument of Mr. Gratien. Mr. Palkhivala relies on the Preamble and the scheme of the Constitution to interpret Article 368 and limit its operation within the contours of the Preamble. The Preamble of the Constitution of India does not seem to prescribe any vague doctrines like the law of natural justice even if the latter, contrary to many decisions of our Court be considered vague.

253. The case, however, furnishes another instance where implied limitations were inferred. After referring to the provisions dealing with "judicature" and the Judges, the Board observed:

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."

254 The Judicial Committee was of the view that there "exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature." The Judicial Committee cut down the plain words of Section 29(1) thus:

> "*Section 29(1) of the Constitution says.*—'Subject to the provisions of this Order Parliament shall have power to make laws for the peace, order and good government of the Island.' These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of Section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the Judicature—e.g., by passing an Act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried—if in law such usurpation would otherwise be contrary to the Constitution." (p. 289)

255. In conclusion the Judicial Committee held that there was interference with the functions of the judiciary and it was not only the likely but the intended effect of the impugned enactments, and that was fatal to their validity.

256. Their Lordships uttered a warning which must always be borne in dealing with constitutional cases: "what is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution". This was in reply to the argument that the Legislature had no such general intention to absorb judicial powers and it had passed the legislation because it was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. According to their Lordships that consideration was irrelvant and gave no validity to acts which infringed the Constitution.

257. *McCawley* v. *The King*[67] was strongly relied on by Mr. Seervai. The case was on appeal from the decision of the High Court of Australia, reported in 26 CLR 9. Apart from the questions of interpretation of sub-section (6), Section 6, of the Industrial Arbitration Act, 1916 and the construction of the Commission which was issued, the main question that was debated before the High Court and the Board was whether the Legislature of Queensland could amend a provision of the Constitution of Queensland without enacting a legislative enactment directly amending the Constitution. The respondents before the Board had contended as follows:

> "But an alteration to be valid must be made by direct legislative enactment. The Constitution can be altered but cannot be disregarded. So long as it subsists it is the test of the validity of legislation. The High Court of Australia so decided in *Cooper's* case.[68] (p. 695)

258. The appellants, on the other hand, had contended that "the Legislature of Queensland has power, by ordinary enactment passed by both Houses and assented to be the Governor in the name of the Crown, to alter the Constitution of Queensland, including the judicial institutions of the State, and the tenure of the judges……….All the laws applying to Queensland which it is competent to the Queensland Legislature to alter can be altered in the same manner by ordinary enactment".

---

[67] 1920 AC 691.

[68] (1907) 4 CLR 1304.

259. There was difference of opinion in the High Court. Griffith, C. J., was of the opinion that the Parliament of Queensland could not merely by enacting a law inconsistent with the Constitution Act of 1867 overrule its provisions, although it might with proper formality pass an Act which expressly altered or repealed it. Isaacs and Rich, JJ., with whom the Board found themselves in almost complete agreement, held to the contrary. The Board, in dealing with the question, first referred to the "distinction between constitutions the terms of which may be modified or repealed with no other formality than if necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly".

Then Lord Birkenhead, L. C., observed at page 704:

> "Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature. Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British Constitution, constituted by historic development but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned Judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter."

260. Then, the Judicial Committee proceeded to deal with the Constitution of Queensland and held that it was an uncontrolled constitution. Later, their Lordships observed:

> "It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation." (p. 706)

261. Mr. Seervai sought to deduce the following propositions from this case:

> "*Firstly*.—Unless there is a special procedure prescribed for amending any part of the Constitution, the Constitution was uncontrolled and could be amended by an Act in the manner prescribed for enacting ordinary laws, and therefore, a subsequent law inconsistent with the Constitution would pro tanto repeal the Constitution;
>
> *Secondly*.—A constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending them than is prescribed for amending an ordinary law, in

> which case an ordinary law cannot amend them and the procedure must be strictly followed if the amendment is to be effected;
>
> *Thirdly*.—Implications of limitation of power ought not be imported from general concepts but only from express or necessarily implied limitations, (i.e., implied limitation without which a constitution cannot be worked); and
>
> *Fourthly*.--The British Parliament in granting the Colonial Legislatures power of legislation as far back as 1865—Section 2—refused to put limitations of vague character, like general principles of law, but limited those limitations to objective standards like statutes and provisions of any Act of Parliament or order or regulation made under the Acts of Parliament."

262. I agree that the first and second propositions are deducible from *McCawley's case* (supra), but I am unable to agree with the learned counsel that the third proposition enunciated by him emerges from the case. The only implied limitation which was urged by the learned counsel for the respondents was that the Queensland Legislature should first directly amend the Constitution and then pass an act which would otherwise have been inconsistent if the Constitution had not been amended. It appears from the judgment of Isaac, J., and the Board that two South Australia Judges had earlier held that the legislation must be "with the object of altering the constitution of the Legislature". Lord Selborne, when Sir Roundell Palmer, and Sir Robert Collier expressed dissent from their view and recommended enactment of a statute like the Colonial Laws Validity Act, 1865.

263. The fourth proposition states a fact. The fact that British Parliament in 1865 refused to put so-called vague limitations does not assist us in deciding whether there cannot be implied limitations on the amending power under Article 368.

264. I shall examine a little later more cases in which limitations on law-making power have been implied both in Australia, U. S. A., and in Canada. *McCawley's case* (supra), is authority only for the proposition that if the constitution is uncontrolled then it is not necessary for the Legislature to pass an act labeling it as an amendment of the constitution; it can amend the constitution like any other act.

265. *Attorney-General for New South Wales* v. *Trethowan*,[69] was concerned really with the interpretation of Section 5 of the Colonial Laws Validity Act, 1865, and its impact on the powers of the Legislature of the New South Wales. The Constitution Act, 1902, as amended in 1929, had inserted Section 7-A, the relevant part of which reads as follows:

> "7-A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section (6) of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section (1) of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this Section. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal

---

[69] 1932 AC 526.

or amendment of any of the following sections of this Act, namely, Sections 13, 14, 15, 18, 19, 20, 21 and 22."

266. Towards the end of 1930 two bills were passed by both Houses of the New South Wales Legislature. The first Bill enacted that Section 7-A above referred to was repealed, and the second Bill enacted by Clause 2, sub-section (1):

> "The Legislative Council of New South Wales is abolished."

267. The contentions advanced before the Judicial Committee were:

> "The appellants urge:
>
> (1) That the King, with the advice and consent of the Legislative Council and the Legislative Assembly, had full power to enact a Bill repealing Section 7-A.
>
> (2) That sub-section (6) of Section 7-A of the Constitution Act is void, because: (*a*) The New South Wales Legislature has no power to shackle or control its successors, the New South Wales constitution being in substance an uncontrolled constitution; (*b*) It is repugnant to Section 4 of the Constitution Statute of 1855; (*c*) It is repugnant to Section 5 of the Colonial Laws Validity Act, 1865.
>
> For the respondents it was contended—
>
> (1) That Section 7-A was a valid amendment of the constitution of New South Wales, validly enacted in the manner prescribed, and was legally binding in New South Wales.
>
> (2) That the Legislature of New South Wales was given by Imperial statutes plenary power to alter the constitution, powers and procedure of such Legislature.
>
> (3) That when once the Legislature had altered either the constitution or powers and procedure, then the constitution and powers and procedure as they previously existed ceased to exist, and were replaced by the new constitution and powers.
>
> (4) That the only possible limitations of this plenary power were: (*a*) it must be exercised according to the manner and form prescribed by any Imperial or colonial law, and (*b*) the Legislature must continue a representative Legislature according to the definition of the Colonial Laws Validity Act, 1865.
>
> (5) That the addition of Section 7-A to the Constitution had the effect of; (*a*) making the Legislative body consist thereafter of the King, the Legislative Council, the Assembly and the people for the purpose of the constitutional enactments therein described, or (*b*) imposing a manner and form of legislation in reference to these constitutional enactments which thereafter became binding on the Legislature by virtue of the Colonial Laws Validity Act, 1865, until repealed in the manner and mode prescribed.
>
> (6) That the power of altering the constitution conferred by Section 4 of the Constitution Statute, 1855, must be read subject to the Colonial Laws Validity Act, 1865 and that in particular the limitation as to manner and form, prescribed by the 1865 Act must be governed by subsequent amendments to the constitution, whether purporting to be made in the earlier Act or not." (p. 537)

268. The Judicial Committee considered the meaning and effect of Section 5 of the Act of 1865, read in conjunction with Section 4 of the Constitution Statute. It is necessary to bear in mind the relevant part of Section 5 which reads as follows:

> "*Section 5.*—Every colonial legislature......and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law, for the time being in force in the said colony."

269. The Judicial Committee interpreted Section 5 as follows:

> "Reading the section as a whole, it gives to the legislatures of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the statute book. Beyond that, the words 'manner and form' are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent."

270. The Judicial Committee first raised the question: "could that Bill, a repealing Bill, after its passage through both chambers, be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner?", and answered it thus:

> "In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of Section 5 of the Act of 1865 states a condition which must be fulfilled before the Legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that Section 7-A may be repealed (in other words, in order that that particular law 'respecting the constitution, powers and procedure' of the Legislature may be validly made) the law for that purpose must have been passed in the manner required by Section 7-A, a Colonial Law for the time being in force in New South Wales."

271. This case has no direct relevance to any of the points raised before us. There is no doubt that in the case before us, the impugned constitutional amendments have been passed according to the form and manner prescribed by Article 368 of our Constitution. It is, however, noteworthy that in contention No. (4), mentioned above, it was urged that notwithstanding the plenary powers conferred on the Legislature a possible limitation was that the Legislature must continue a representative Legislature according to the definition of the Colonial Laws Validity Act, 1865. This is another illustration of a limitation implied on amending power.

272. I may also refer to some of the instances of implied limitations which have been judicially accepted in the United States. It would suffice if I refer to Cooley on. *Constitutional Limitations and Constitution of the United States of America*, edited by Corwin (1952).

273. After mentioning express limitations, imposed by the Constitution upon the Federal power to tax, Cooley on '*Constitutional Limitations*' (page 989) states:

> "……… but there are some others which are implied, and which under the complex system of American Government have the effect to exempt some subjects otherwise taxable from scope and reach, according to circumstances, of either the Federal power to tax or the power of the several States. One of the implied limitations is that which precludes the States from taxing the agencies whereby the general government performs its functions. The reason is that, if they possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operation of the national authority within its proper and constitutional sphere of action."

274. Then he cites the passage from the Chief Justice Marshall in *McCullock* v. *Maryland*.[70]

275. In "*Constitution by the United States of America*" by Corwin (1952) — page 728-729 it is stated:

> "Five years after the decision in *McCullock* v. *Maryland* (supra), that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did re-examine the entire question in *Osborn* v. *Bank of the United States* (supra). In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was 'contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court'. To which Marshall replied that: 'It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. Secondly the appellants relied greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of Government, *** Not so the directors of the bank. The connection of the Government with the bank, is likened to that with contractors'. Marshall accepted this analogy, but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions. Thus not only was the decision of *McCullock* v. *Maryland* (supra), reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades."

276. We need not examine the exact extent of the doctrine at the present day in the United States because the only purpose in citing these instances is to refute the argument of the respondents that there cannot be anything like implied limitations.

277. The position is given at p. 731, as it existed in 1952, when the book was written. Corwin sums up the position broadly at p. 736:

> "Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by

---

[70] 4 Ed 579, 607.

statute, e. g. that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed."

278. Regarding the taxation of States, Cooley says at pp. 995-997:

> "If the States cannot tax the means by which the national government performs its functions, neither, on the other hand and for the same reasons can the latter tax the agencies of the State governments. 'The same supreme power which established the departments of the general government determined that the local government should also exist for their own purposes, and made it impossible to protect the people in their common interest without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the Constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the Constitution of the United States which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the national legislature as if the interference were direct and extreme. It has, therefore, been held that the law of Congress requiring judicial process to be stamped could not constitutionally be applied to the process of the State courts; since otherwise Congress might impose such restrictions upon the State courts as would put an end to their effective action, and be equivalent practically to abolishing them altogether. And a similar ruling has been made in other analogous cases. But 'the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

279. I may mention that what has been implied in the United States is the subject-matter of express provisions under our Constitution (see Articles 285, 287, 288 and 289).

280. It was urged before us that one of these cases dealt with implied limitations on the amending power. It seems to me that four cases are directly in point. I have referred already to:

(1) *The Bribery Commissioner* v. *Pedrick Ranasinghe.*[71]

(2) *Mangal Singh* v. *Union of India.*[72]

(3) *Taylor* v. *The Attorney-General of Queensland.*[73]

and I will be discussing shortly *In re The Initiative and Referendum Act.*[74]

281. What is the necessary implication from all the provisions of the Constitution?

282. It seems to me that reading the Preamble the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.

---

[71] 1965 AC 172.

[72] (1967) 2 SCR 109-112: AIR 1967 SC 944: (1968) 1 SCJ 240.

[73] 23 CLR 457.

[74] 1919 AC 935.

283. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

284. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

285 This conclusion is reinforced if I consider the consequences of the contentions of both sides. The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a four years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid This would no doubt invite extra-constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

286. However, if the meaning I have suggested is accepted a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen.

287. For the aforesaid reasons, I am driven to the conclusion that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest.

288. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment.

289. If this meaning is given it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen.

290. It is urged by Mr. Seervai that we would be laying down a very unsatisfactory test which it would be difficult for the Parliament to comprehend and follow. He said that the Constitution-makers had discarded the concept of "due process" in order to have something certain, and they substituted the words "by authority of law" in Article 21. I am unable to see what bearing the dropping of the words "due process" has on this question. The Constitution itself has used words like "reasonable restrictions" in Article 19 which do not bear an exact meaning, and which cannot be defined with precision to fit in all cases that may come before the courts; it would depend upon the facts of each case whether the restrictions imposed by the legislature are reasonable or not. Further, as Lord Reid observed in *Ridge* v. *Baldwin*[75]:

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But *I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist*. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that." (Emphasis supplied).

291. It seems to me that the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand.

292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

(1) *Supremacy of the Constitution*;
(2) *Republican and Democratic form of Government*;
(3) *Secular character of the Constitution*;
(4 *Separation of powers between the legislature, the executive and the judiciary*;
(5) *Federal character of the Constitution*.

293. The above structure is built on the basic foundation, i. e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed

294. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed.

295. In connection with the question of abrogation of fundamental rights, Mr. Seervai boldly asserted that there was no such thing as natural or inalienable rights because the scheme of Part III itself shows that non-citizens have not been given all the fundamental freedoms; for example, Article 19 speaks of only citizens. He says that if there were natural rights, why is it that they were not conferred on non-citizens. The answer seems to be that they are natural rights but our country does not thing it expedient to confer these fundamental rights, mentioned in Article 19, on non-citizens. Other rights have been conferred on non-citizens because the Constitution-makers thought that it would not be detrimental to the interests of the country to do so.

---

[75] 1964 AC 40, 64-65.

296. He then said that even as far as citizens are concerned, there is power to modify those rights under Article 33 of the Constitution, which enables Parliament to modify rights in their application to the Armed Forces. This power has been reserved in order to maintain discipline among the armed forces, which is essential for the security of the country. But it does not mean that the rights cease to be natural or human rights. He then said that similarly Article 34 restricts fundamental rights while martial law is in force in any area. This again is a case where the security of the country is the main consideration. Citizens have to undergo many restrictions in the interest of the country.

297. He then pointed out Articles 358 and 359 where certain rights are suspended during Emergency. These provisions are again based on the security of the country.

298. He also relied on the words "rights conferred" in Article 13(2) "enforcement of any rights conferred by this Part" to show that they were not natural or inalienable and could not have been claimed by them. There is no question of the sovereign people claiming them from an outside agency. The people acting through the Constituent Assembly desired that the rights mentioned in Part III shall be guaranteed and, therefore, Part III was enacted. In the context 'conferred' does not mean that some superior power had granted those rights. It is very much like a King bestowing the title of 'His Imperial Majesty' on himself.

299. I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as inalienable.

300. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'. Some of these decisions are extracted below:

> "There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal, which assures to the citizen the dignity of the individual and other cherished *human values* as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, *reserved* to themselves certain fundamental rights so-called, *I apprehend because they have been retained by the people* and made paramount to the delegated powers, as in the American Model. (Per Patanjali Sastri, J., in *Gopalan* v. *State of Madras*.[76]") (Emphasis supplied).
>
> (*ii*) "That article (Article 19) enumerates certain freedoms under the caption 'right to freedom' and deals with those great and basic rights which are recognised and guaranteed as the *natural rights* inherent in the status of a citizen of a free country. (Per Patanjali Sastri, C J., in *State of West Bengal* v. *Subodh Gopal Bose*.[77]") (Emphasis supplied).

---

[76] 1950 SCR 88, 198-199: AIR 1950 SC 27: 1950 SCJ 174.

[77] 1954 SCR 587, 596: AIR 1954 SC 92: 1954 SCJ 127.

"I have no doubt that the framers of our Constitution drew the same distinction and classed the *natural right* or capacity of a citizen 'to acquire, hold and dispose of property' with other *natural rights* and freedoms inherent in the status of a free citizen and embodied them in Article 19(1) . .. .(ibid, p. 597)" (Emphasis supplied).

"For all these reasons, I am of opinion that under the scheme of the Constitution, all those *broad and basis freedoms inherent in the status of a citizen as a free man* are embodied and protected from invasion by the State under clause (1) of Article 19..................." (ibid., p. 600) (Emphasis supplied).

(*iii*) "The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the Government of the country andother spheres The people who vested the three limbs of Government with their power and authority, at the same time kept back these rights of citizens and also some times of non-citizens, and made them *inviolable* except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed 'Fundamental Rights', and the conditions under which these rights can be abridged are also indicated in that Part. (Per Hidayatullah, J. in *Ujjambai* v. *State of U. P.*[78]") (Emphasis supplied).

301. The High Court of Allahabad has described them as follows:

"(*iv*)........man has certain *natural* or *inalienable rights* and that it is the function of the State, in order that human liberty might be preserved and human personality developed, to give recognition and free play to those rights............"

"suffice it to say that they represent a trend in the democratic thought of our age. (*Motilal* v. *State of U. P.*)[79]" (Emphasis supplied)

302. Mr. Seervai relied on the observations of S. K. Das, J., in *Basheshar Nath* v. *C. I. T.*[80]:

"I am of the view that the doctrine of 'natural rights' affords nothing but a foundation of shifting sand for building up a thesis that the doctrine of waiver does not apply to the rights guaranteed in Part III of our Constitution."

303. I must point out that the learned Judge was expressing the minority opinion that there could be a waiver of fundamental rights in certain circumstancs. Das, C. J., and Kapur, J., held that there could be no waiver of fundamental rights founded on Article 14 of the Constitution, while Bhagwati and Subba Rao, JJ., held that there could be no waiver not only of fundamental rights enshrined in Article 14 but also of any other fundamental rights guaranteed by Part III of the Constitution.

304. Article 14 has been described variously as follows:

(1) "as the basic principle of republicanism" (per Patanjali Sastri, C. J., in *State of West Bengal* v. *Anwar Ali Sarkar*),[81]

---

[78] (1963) 1 SCR 778, 926-27: AIR 1962 SC 1621.

[79] ILR (1951) 1 All 269, 387-88: AIR 1951 All 257.

[80] 1959 Supp 1 SCR 528, 605: AIR 1959 SC 149: 35 ITR 190.

[81] 1952 SCR 284, 293: AIR 1952 SC 75: 1952 SCJ 55.

(2) "as a principle of republicanism" (per Mahajan, J., Ibid., p. 313);

(3) "as founded on a second public policy recognised and valued in all civilized States." (per Das, C. J.: *Basheshar Nath* v. *C. I. T.*),[82]

(4) "as a necessary corollary to the high concept of the rule of law (per Subba Rao, C. J., in *Satwant Singh* v. *Passport Officer*,[83]"

(5) "as a vital principle of republican institutions" (*American Jurisprudence*, Vol. 16, 2d., p. 731, Art. 391).

305. How would this test be operative *vis-a-vis* the constitutional amendments made hitherto? It seems to me that the amendments made by the Constitution (First Amendment) Act, 1951, in Articles 15 and 19, and insertion of Article 31-A (apart from the question whether there was delegation of the power to amend the Constitution, and apart from the question as to abrogation), and the amendment made by the Constitution (Fourth Amendment) Act in Article 31(2), would be within the amending power of Parliament under Article 368.

306. Reference may be made to *Mohd. Maqbool Damnoo* v. *State of Jammu and Kashmir*[84] where this Court repelled the argument of the learned counsel that the amendments made to Sections 26 and 27 of the Constitution of Jammu and Kashmir were bad because they destroyed the structure of the Constitution. The arguments of the learned counsel was that fundamentals of the Jammu and Kashmir State Constitution had been destroyed. This argument was refuted in the following words:

> "But the passage cited by him can hardly be availed of by him for the reason that the amendment impugned by him, in the light of what we have already stated about the nature of the explanation to Article 370 of our Constitution, does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution. The State Governor still continues to be the head of the Government aided by a council of ministers and the only change affected is in his designation and the mode of his appointment. It is not as if the State Government, by such a change, is made irresponsible to the State Legislature, or its fundamental character as a responsible Government is altered. Just as a change in the designation of the head of that Government was earlier brought about by the introduction of the office of Sadar-i-Riyasat so too a change had been brought about in his designation from that of Sadar-i-Riyasat to the Governor. That was necessitated by reason of the Governor having been substituted in place of Sadar-i-Riyasat. There is no question of such a change being one in the character of that Government from a democratic to a non-democratic system."

307. Before parting with this topic I may deal with some other arguments addressed to us. Mr. Seervai devoted a considerable time in expounding principles of construction of statutes, including the Constitution. I do not think it is necessary to review the decisions relating to the principles of interpretation of legislative entries in Articles 245 and 246 of the Constitution. The Federal Court and this Court in this connection have followed the principles enunciated by the Judicial Committee in interpreting Sections 91 and 92 of the Canadian Constitution. I have no quarrel with these propositions but I am unable to see that these propositions have any bearing on the interpretation of Article 368. The fact that legislative entries are given wide interpretation has no relevance to the interpretation of Article 368. The second set of cases referred to deal with the question whether it is legitimate to consider consequences of a particular construction.

---

[82] 1959 Supp 1 SCR 528, 551: AIR 1959 SC 149: 35 ITR 190.

[83] (1967) 3 SCR 525, 542: AIR 1967 SC 1836: (1968) 1 SCJ 178.

[84] (1972) 1 SCC 536, 546.

308. He referred to *Vacher & Sons* v. *London Society of Compositors.*[85] This decision does not support him in the proposition that consequences of a particular construction cannot be considered, for Lord Machaghten observed at p. 117:

> "Now it is 'the universal rule', as Lord Wensleydale observed in *Grey* v. *Pearson*[86] that in construing statutes, as in construing all other written instruments 'the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

Then he observed at. p. 118:

> "In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed."

Lord Atkinson observed at pp. 121-122:

> "It is no doubt well-established that, in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction for, as there are many things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them. But, as Lord Halsbury laid down in *Cooke* v. *Charles A. Vogeler Co.*[87], a Court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordship's House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous.

---

[85] 1913 AC 107, 117-118.
[86] (1857) 6 HLC 61, 106.
[87] 1901 AC 102 at 107.

309. The next case referred to is *Bank of Toronto* v. *Lambe*[88], but this case is explained in *Attorney-General for Alberta* v. *Attorney-General for Canada*.[89] The Judicial Committee first observed :

> "It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked ; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a conclusion that the Bill is ultra vires. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive."

310. Then their Lordships made the following observations on the decision of the Judicial Committee in *Bank of Toronto* v. *Lambe* (supra) :

> "That case seems to have occasioned a difficulty in the minds of some of the learned Judges in the Supreme Court. It must, however, be borne in mind that the Quebec Act in that case was attacked on two specific grounds, first, that the tax was not 'taxation with the Province,' and secondly, that the tax was not a 'direct tax'. It was never suggested, and there seems to have been no ground for suggesting, that the Act was by its effect calculated to encroach upon the classes of matters exclusively within the Dominion powers. Nor, on the other hand, was there any contention, however faint or tentative, that the purpose of the Act was anything 'other' than the legitimate one of raising a revenue for Provincial needs. ... It was never laid down by the Board that if such a use was attempted to be made of the Provincial power as materially to interfere with the Dominion power, the action of the province would be intra vires."

311. This case further shows that serious consequences can be taken into consideration.

312. I agree with the observations of Lord Esher in *Queen* v. *Judge of City of London Court*[90], cited by him. These observations are :

> "If the words of an Act are clear, you must follow them, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity. In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear ; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

313. He then relied on the observations of Lord Greene, M. R., in *Grundet* v. *Great Boulder Proprietary Mines Ltd.*[91] :

> "There is one rule, I think, which is very clear—and this brings me back to where I started, the doctrine of absurdity—that although the absurdity or the non-absurdity of one conclusion as compared with another may be of assistance, and very often is of assistance, to the court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with

---

[88] (1887) 12 AC 575, 586.

[89] 1939 AC 117, 132, 133.

[90] (1892) 1 QB 273-290.

[91] (1948) 1 Ch 145, 159.

> great care, remembering that judges may be fallible in this question of an absurdity, and in any event must not be applied so as to result in twisting language into a meaning which it cannot bear; it is a doctrine which must not be relied upon and must not be used to re-write the language in a way different from that in which it was originally framed."

Earlier, he had said at p. 158:

> " 'Absurdity' I cannot help thinking, like public policy, is a very unruly horse......"

314. As I read Lord Greene, what he meant to say was that "absurdity" was an unruly horse, but it can be of assistance, and very often is of assistance, in choosing between two possible meanings of ambiguous words and this is exactly the use which this Court is entitled to make of the consequences which I have already mentioned.

Mr. Seervai referred to *State of Punjab* v. *Ajaib Singh*,[92] Das, J. observed:

> "We are in agreement with learned counsel to this extent only that if the language of the article is plain and unambiguous and admits of only one meaning then the duty of the court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If, however, two constructions are possible, then the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory."

315. He also referred to the following passage in *Collector of Customs, Baroda* v. *Digvijaysinghi Spinning & Weaving Mills Ltd.*[93]:

> "It is one of the well-established rules of construction that 'if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature'. It is equally well-settled principle of construction that 'Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating'; and that alternative is to be rejected which will introduce uncertainty."

316. What he urged before us, relying on the last two cases just referred to, was that if we construed the word "amendment" in its narrow sense, then there would be uncertainty, friction and confusion in the working of the system, and we should therefore avoid the narrow sense.

317. If Parliament has power to pass the impugned amendment acts, there is no doubt that I have no right to question the wisdom of the policy of Parliament. But if the net result of my interpretation is to prevent Parliament from abrogating the fundamental rights, and the basic features outlined above, I am unable to appreciate that any uncertainty, friction or confusion will necessarily result.

318. He also drew our attention to the following observations of Hegde, J., in *Budhan Singh* v. *Nabi Bux*[94]:

> "Before considering the meaning of the word 'held', it is necessary

---

[92] 1953 SCR 254, 264: AIR 1953 SC 10: 1952 SCJ 664.

[93] (1962) 1 SCR 896-899: AIR 1961 SC 1549: (1963) 1 SCJ 278.

[94] (1970) 2 SCR 10, 15-16: (1969) 2 SCC 481.

> to mention that it is proper to assume that the law-makers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words, as observed by Crawford in his book on Statutory Construction the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the Legislature, there is little reason to believe that it represents the legislative intent."

319. I am unable to appreciate how these observations assist the respondents. If anything, these observations are against them for when I come to the question of interpretation of the 25th Amendment I may well approach the interpretation keeping those observations in mind.

320 Both Mr. Seervai and the learned Attorney-General have strongly relied on the decisions of the United States Supreme Court, Federal Courts and the State Courts on the interpretation of Article V of the Constitution of the United States and some State Constitution. Mr Palkhivala, on the other hand, relied on some State decisions in support of his submissions.

321. Article V of the Constitution of the United States differs greatly from Article 368 of our Constitution. For facility of reference Article V is reproduced below:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

322. It will be noticed that Article V provides for two steps to be taken for amending the Constitution. The first step is proposal of an amendment and the second step is ratification of the proposal. The proposal can be made either by two-thirds of both Houses of Congress or by a convention called by the Congress on the application of the legislatures of two-thirds of several States.

323. Congress determines which body shall ratify the proposal. It can either be the legislatures of three-fourths of the States or by conventions in three-fourths of the States.

324. If a proposal is made by a Convention and ratified by three-fourths of the States in conventions it can hardly be doubted that it is amendment made by the people. Similarly if a proposal is made by the Congress and ratified by convention there cannot be any doubt that it is the people who have amended the Constitution. Proposal by Congress and ratification by three-fourth legislatures of the States can in this context be equated with action of the people. But what is important to bear in mind is that the Congress, a federal legislature, does not itself amend the Constitution.

325. In India, the position is different. It is Parliament, a federal legislature, which is given the power to amend the Constitution except in matters which are mentioned in the proviso. I may repeat that many important provisions including fundamental rights are not mentioned in the proviso. Can we say that an amendment made by Parliament is an amendment made by the people? This is one of the matters that has to be borne in mind while considering the proper meaning to be given to the expression "amendment of this Constitution" in Article 368 as it stood before its amendment by the 24th Amendment.

326. Article V of the U. S. Constitution differs in one other respect from Article 368. There are express limitations on amending power. The first, which has spent its force, was regarding the first and fourth clauses in the ninth section of the first article and the second relates to deprivation of a State's suffrage in the Senate without its consent. Apart from the above broad differences in Article V as compared to Article 368, the Constitution of India is different in many respects which has a bearing on the extent of the power of Parliament to amend the Constitution. In brief they are: the background of the struggle for freedom, various national aspirations outlined during this struggle, the national objectives as recited in the Objectives Resolution, dated January 22, 1947, and the Preamble, the complex structure of the Indian nation consisting as it does of various peoples with different religions and languages and in different stages of economic development. Further the U. S. Constitution has no Directive Principles as has the Indian Constitution. The States in U. S. have their own Constitutions with the right to modify them consistently with the Federal Constitution. In India the States have no power to amend that part of the Indian Constitution which lays down their Constitution. They have legislative powers on certain specified subjects, the residuary power being with Parliament.

327. I may before referring to the decisions of the Supreme Court of the United States say that that court has hitherto not been confronted with the question posed before us: Can Parliament in exercise of its powers under Article 368 abrogate essential basic features and one fundamental right after another including freedom of speech, freedom of religion, freedom of life? The American decisions would have been of assistance if this fundamental question had arisen there and if the power to amend the Federal Constitution had been with two-third majority of the Congress.

328. The question before the Court in *Hawke* v. *Smith*,[95] was whether the States while ratifying proposals under Article V of the Constitution were restricted to adopt the modes of ratification mentioned in Article V i. e., by the legislatures or by conventions therein, as decided by Congress, or could they ratify a proposed amendment in accordance with the referendum provisions contained in State Constitutions or statutes.

329. The Court held that "the determination of the method of ratification is the exercise of a national power specifically granted by the Constitution" and "the language of the article is plain, and admits of no doubt in its interpretation". The Court also held that the power was conferred on the Congress and was limited to two methods: by action of the legislatures of three-fourths of the States, or conventions in a like number of States.

---

[95] 64 L Ed 871.

330. The Court further held that the power to ratify a proposed amendment to the Federal Constitution had its source in the Federal Constitution and the act of ratification by the State derived its authority from the Federal Constitution to which the State and its people had alike assented.

331. This case is of no assistance to us in interpreting Article 368 of the Constitution.

332. I may now refer to decisions of the Supreme Court *Rhode Island* v. *Palmer*.[96] This case was concerned with the validity of the 18th Amendment and of certain general features of the National Prohibiton Law known as Volstead Act. No reasons were given by the Court for the conclusions arrived at. The conclusions which may have some relevance for us are conclusion 4 and 5. The learned counsel sought to deduce the reasons for these conclusions from the arguments addressed and reported in 64 L. Ed., and for the reasons given by the learned Judge in 264 Fed. Rep. 186 but impliedly rejected by the Supreme Court by reversing the decision.

333. Counsel sought to buttress this argument by citing views of learned American authors that the arguments against the validity of the 18th Amendment were brushed aside although no reasons are given. I have great respect for the judges of the Supreme Court of United States, but unless the reasons are given for a judgment it is difficult to be confident about the ratio of the decision. Apart from the decision, I would be willing to hold the 18th Amendment valid if it had been enacted by our Parliament and added to our Constitution, for I would discern no such taking away of fundamental rights or altering the basic structure of the Constitution as would place it outside the contours of the Preamble and the basic features of the Constitution.

334. *United States of America* v. *William H. Sorague*,[97] was concerned with the validity of the 18th Amendment. The District Court had held[98] that the 18th Amendment had not been properly ratified so as to become part of the Constitution. It was the contention of the respondents before the Supreme Court that notwithstanding the plain language of Article V, conferring upon the Congress the choice of method of ratification, as between action by legislatures and by conventions, this Amendment could only be ratified by the latter. The respondents urged that there was a difference in the kind of amendments, as, e.g. "mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other". There was no question as to ambit of the power of amendment. In other words, there was no question that the subject-matter of amendment, namely, prohibition, fell within Article V of the Constitution.

335. The Court held that the choice of the mode rested solely in the discretion of the Congress. They observed:

> "It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of

---

[96] 64 L Ed 946.
[97] 75 L Ed 640.
[98] 44 F (2d) 967.

ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification."

336. The Court further held that the 10th Amendment had no limited and special operation upon the people's delegation by Article V of certain functions to the Congress.

337. I am unable to see how this case helps the respondents in any manner. On the plain language of the article the Court came to the conclusion that the choice of the method of ratification had been entrusted to the Congress. We are not concerned with any such question here.

338. Mr. Seervai urged that the judgment of the District Court showed that the invalidity of the 18th Amendment to the Constitution could be rested on two groups of grounds; group A consisted of grounds relating to the meaning of the word "amendment" and the impact of the 10th Amendment or the nature of the federal system on Article V of the Constitution, and that Article V by providing the two alternative methods of ratification by convention and legislature showed that the convention method was essential for valid ratification when the amendment affected the rights of the people. Group B consisted of the grounds on which the District Court declared the 18th Amendment to be invalid and those were that "the substance of an amendment, and therefore of course, of an entirely new Constitution, might have to conform to the particular theories of political science, sociology, economics, etc., held by the current judicial branch of the Government".

339. He then pointed out that grounds mentioned in Group B, which were very much like Mr. Palkhiwala's arguments, were not even urged by counsel in the Supreme Court, and, therefore we must regard these grounds as extremely unsound. I, however, do not find Mr. Palkhivala's arguments similar to those referred to in Group B. It is true articles like Marbury's "The Limitations upon the Amending Power,—33 Harvard Law Rev. 232", and McGovney's "Is the Eighteenth Amendment void because of its content?" (20 Col. Law Rev. 499), were brought to our notice but for a different purpose. Indeed the District Judge criticised these writers for becoming enmeshed "in a consideration of the constitutionality of the substance of the amendment"—the point before us. As the District Judge pointed out, he was concerned with the subject-matter of the 18th Amendment because of the relation between that substance or subject-matter and manner of its adoption. (p. 969)

340. I do not propose to decide the validity of the amendment on the touchstone of any particular theory of political science, sociology, economics. Our Constitution is capable of being worked by any party having faith in democratic institutions. The touchstone will be the intention of the Constitution-makers, which we can discern from the Constitution and the circumstances in which it was drafted and enacted.

341. A number of decisions of State Courts were referred to by both the petitioners and the respondents. But the State Constitutions are drafted in such different terms and conditions that it is difficult to derive any assistance in the task before us. Amendments of the Constitution are in effect invariably made by the people.

342. These decisions on the power to amend a Constitution are not very helpful because "almost without exception, amendment of a State constitution is effected, ultimately, by the vote of the people. Proposed amendments ordinarily reach the people for approval or disapproval in one of two ways; but submission from a convention of delegates chosen by the people for the express purpose of revising the entire instrument, or by submission from the legislature of propositions which the Legislature has approved, for amendment of the Constitution in specific respects. However, in some states constitutional amendments may be proposed by proceedings under initiative and referendum, and the requirements governing the passage of statutes by initiative and referendum are followed in making changes in the state constitutions." (*American Jurisprudenee,* Vol. 16, 2d., p. 201). In footnote 9 it is stated:

> "Ratification or non-ratification of a constitutional amendment is a vital element in the procedure to amend the constitution." (*Towns* v. *Suttles,* 208 Ga 838, 69 SE 2d 742).
>
> The question whether the people may, by the terms of the constitution, delegate their power to amend to others—for example, to a constitutional convention—is one on which there is a notable lack of authority. An interesting question arises whether this power could be delegated to the Legislature, and if so, whether the instrument which the legislature would then be empowered to amend would still be a constitution in the proper sense of the term."

343. This footnote brings out the futility of referring to decisions to interpret a constitution, wherein power to amend has been delegated to Parliament.

344. That there is a distinction between the power of the people to amend a Constitution and the power of the legislature to amend the same was noticed by the Oregon Supreme Court in *Ex parte Mrs. D. C. Kerby,*[99] one of the cases cited before us by the respondent. McCourt, J., speaking for the Court distinguished the case of *Eason* v. *State* (supra) in these words:

> "Petitioner cites only one authority that has any tendency to support the contention that a provision in the bill of rights of a constitution cannot be amended—the case of *Eason* v. *State* (supra). Upon examination that case discloses that the Arkansas Constitution provided that the Legislature might, by the observation of a prescribed procedure, amend the Constitution without submitting the proposed amendment to a vote of the people of the state, and the Bill of Rights in that Constitution contained a provision not found in the Oregon Constitution, as follows: 'Everything in this article is excepted out of the general powers of government'."
>
> The Court held that the clause quoted exempted the provisions in the Bill of Rights from the authority delegated to the Legislature to amend the Constitution, and reserved the right to make any such amendment to the people themselves, so that the case is in fact an authority in support of the right of the people to adopt such an amendment.
>
> The case is readily distinguished from the instant case, for every proposed amendment to the Oregon Constitution, in order to become effective, must be approved by a majority vote of the people, recorded at a state election, and consequently, when approved and adopted,

---

[99] 36 ALR 1451, 1455.

> such an amendment constitutes a direct expression of the will of the people in respect to the subject embraced by the particular measure, whether the same be proposed by initiative petition or by legislative resolution."

345. No report of the decision in *Eason* v. *State* (supra) is available to me but it appears from the annotation at page 1457 that it was conceded that a constitutional provision might be repealed if done in the proper manner, viz., by the people, who have the unqualified right to act in the matter. The Court is reported to have said:

> "And this unqualified right they can constitutionally exercise by means of the legislative action of the general assembly in providing by law for the call of a convention of the whole people to reconstruct or reform the government, either partially or entirely. And such convention, when assembled and invested with the entire sovereign power of the whole people (with the exception of such of these powers as have been delegated to the Federal Government), may rightfully strike out or modify any principle declared in the Bill of Rights, if not forbidden to do so by the Federal Constitution."

346. Both sides referred to a number of distinguished and well-known authors. I do not find it advantageous to refer to them because the Indian Constitution must be interpreted according to its own terms and in the background of our history and conditions. Citations of comments on the Indian Constitution would make this judgment cumbersome. I have had the advantage of very elaborate and able arguments on both sides and I must apply my own mind to the interpretation.

347. The learned Attorney-General brought to our notice extracts from 71 Constitutions. I admire the research undertaken but I find it of no use to me in interpreting Article 368. First the language and the setting of each Constitution is different. Apart from the decisions of the Court in United States there are no judicial decisions to guide us as to the meaning of the amending clauses in these constitutions. Further, if it is not helpful to argue from one Act of Parliament to another (see *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan*,[1] much less would it be helpful to argue from one Constitution to another different Constitution (see *Bank of Toronto* v. *Lambe*.[2])

348. During the course of the arguments I had drawn the attention of the Counsel to the decision of the Supreme Court of Ireland in *The State* (*at the prosecution of Jeremiah Ryan*) v. *Captain Michael Lennon and Others*,[3] and the respondents place great reliance on it. I may mention that this case was not cited before the Bench hearing *Golak Nath's case* (supra). On careful consideration of this case, however, I find that this case is distinguishable and does not afford guidance to me in interpreting Article 368 of the Constitution.

349. In order to appreciate the difference between the structure of Article 50 of the Irish Constitution of 1922 and Article 368 of the Indian Constitution it is necessary to set out Article 50, before its amendment. It reads:

> "50. Amendments of this Constitution within the terms of the

---

1. 1933 AC 378, 389.
2. (1887) 12 AC 575-587.
3. 1935 IR 170.

> Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation, and as such shall be subject to the provisions of Article 47 hereof."

350. It will be noticed that after the expiry of the period of eight years mentioned in the article, the amending power was not with the Oireachtas as every amendment had to be first passed by the two Houses of the Oireachtas and then submitted to a referendum of the people, and the condition of the referendum was that a majority of the votes on the register shall have recorded their votes on such referendum, and either the voters of a majority of the votes on the register, or two-thirds of the votes recorded shall have been cast in favour of such amendment. So, in fact, after the expiry of the first eight years, the amendments had to be made by the people themselves. In our Article 368 people as such are not associated at all in the amending process.

351. Further, the Irish Constitution differed from the Indian Constitution in other respects. It did not have a Chapter with the heading of fundamental rights, or a provision like our Article 32 which is guaranteed. The words "fundamental rights" were deliberately omitted from the Irish Constitution (see footnote 9 page 67, The Irish Constitution by Barra O'Briain, 1929). At the same time, there was no question of any guarantee to any religious or other minorities in Ireland.

352. It will be further noticed that for the first eight years an amendment could be made by way of ordinary legislation, i.e., by ordinary legislative procedure. The sixth amendment had deleted from the end of this article the words "and as such shall be subject to the provisions of Article 47 which provided for a referendum hereof. In other words, for the first eight years it was purely a flexible constitution, a constitutional amendment requiring no special procedure.

353. With these differences in mind, I may now approach the actual decision of the Supreme Court.

354. The High Court and the Supreme Court were concerned with the validity of the Constitution (Amendment No. 17) Act, 1931 (No. 37 of 1931) having regard to the provisions of the Constitution. The validity of that Act depended on the validity of the Constitution (Amendment No. 10) Act, 1928, No. 8 of 1928, and of the Constitution (Amendment No. 16) Act, 1929, No. 10 of 1929.

355. The Constitution (Amendment No. 17) Act, 1931 was passed as an Act of the Oireachtas on October 17, 1931, i.e., some 11 months after the expiry of the period of 8 years mentioned in Article 50 of the Constitution, as originally enacted. It was not submitted to a referendum of the people. It was described in its long title as an "Act to amend the Constitution by inserting therein an Article making better provision for safeguarding the rights of the people and containing provisions for meeting a prevalence of disorder". But there is no doubt that it affected various human rights which were granted in the Irish Constitution.

356. The Constitution (Amendment No 10) Act No. 8 of 1928 removed Articles 47 and 48 of the Constitution and also the words "and as such shall be subject to the provisions of Article 47 thereof" from the end of Article 50 as originally enacted. Constitution (Amendment No. 16) Act No. 10 of 1929 purported to amend Article 50 of the Constitution by deleting the words "eight years" and inserting in place thereof the words "sixteen years" in that Article.

357. The impugned amendment was held valid by the High Court. Sullivan P., J., interpreted the word "amendment" in Article 50 widely relying on *Edwards* v *Attorney-General of Canada*.[4] Meredith, J., relied on the fact that the width of the power of amendment for the period during the first eight years was co-extensive with the period after eight years and he could find no distinction between Articles of primary importance or secondary importance. O'Byrne, J., could not see any distinction between the word "amendment" and the words "amend or repeal".

358. In the Supreme Court, the Chief Justice first noticed "that the Constitution was enacted by the Third Dail, sitting as a Constituent Assembly, and not by the Oireachtas, which, in fact, it created". He read three limitations in the Constitution. The first, he described as the over-all limitation thus:

> "The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend, or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that 'all powers of government and all authority, legislative, executive and judicial, in Ireland are derived from the people of Ireland …………'." (p. 204)

359. The limitation was deduced thus: "It follows that every Act, whether legislative, executive or judicial, in order to be lawful under the the Constitution, must be capable of being justified under the authority thereby declared to be derived from God".

360. Now this limitation in so far as it proceeds from or is derived from the belief in the Irish State that all lawful authority comes from God to the people, can have no application to our Constitution.

361. The second limitation he deduced from Section 2 of the Irish Free State Act and Article 50 of the Irish Constitution. It was that any amendment repugnant to the Scheduled Treaty shall be void and in operative.

362. The third limitation was put in these words:

> "The Third Dail Eireann has, therefore, as Constituent Assembly, of its own supreme authority, proclaimed its acceptance of and declared, in relation to the Constitution which it enacted, certain principles, and in language which shows beyond doubt that they are stated as governing principles which are fundamental and absolute (except as expressly

---

[4] 1930 AC 124.

> qualified), and, so, necessarily, immutable. Can the power of amendment given to the Oireachtas be lawfully exercised in such a manner as to violate these principles which, as principles, the Oireachtas has no power to change? In my opinion there can be only one answer to that question, namely, that the Constituent Assembly cannot be supposed to have in the same breath declared certain principles to be fundamental and immutable, or conveyed that sense in other words, as by a declaration of inviolability, and at the same time to have conferred upon the Oireachtas power to violate them or to alter them. In my opinion, any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void." (p. 209)

363. He further said that these limitations would apply even after the expiry of eight years He said:

> "I have been dealing with limitations of the power of amendment in relation to the kinds of amendment which do not fall within the scope of the power and which are excluded from it always, irrespective of the time when, i. e. within the preliminary period of eight years or after, or the process by which, amendment is attempted." (p. 209)

364. He then approached the validity of the 16th Amendment in these words:

> "Was, then, the Amendment No. 16 lawfully enacted by Act No. 10 of 1929? There are two principal grounds for impeaching its validity; the first, the taking away whether validily or not, in any case the effective removal from use, of the Referendum; and the right to demand a Referendum; the second, that the Amendment No. 16 is not within the scope of the power of amendment, and therefore the Oireachtas was incompetent to enact it." (p. 212)

He thought:

> "The Oireachtas, therefore, which owes its existence to the Constitution, had upon its coming into being such, and only such, power of amendment (if any) as had been given it by the Constituent Assembly in the Constitution, that is to say, the express power set out in Article 50, and amendments of the Constitution could only be validly made within the limits of that power and in the manner prescribed by that power." (p. 213)

He then observed:

> "Now, the power of amendment is wholly contained in a single Article, but the donee of the power and the mode of its exercise are so varied with regard to a point of time as to make it practically two separate powers, the one limited to be exercised only during the preliminary period of eight years, the other, a wholly different and permanent power, to come into existence after the expiry of that preliminary period and so continue thereafter." (p. 213)

365. After referring to the condition (it shall be subject to the provision of Article 47) he thought:

> "The Constituent Assembly, even during the preliminary period, would not relax the ultimate authority of the people, and expressly reserved to the people the right to intervene when they considered it

> necessary to restrain the action of the Oireachtas affecting the Constitution. The frame of this provision makes it clear to my mind that, even if, by amendment of the Constitution under the power, Article 47 might cease to apply to ordinary legislation of the Oireachtas, the provisions of that clause were declared, deliberately, expressly and in a mandatory way, to be kept in force and operative for the purpose of amendments of the Constitution during the preliminary period of eight years." (p. 213).

366. According to him "the permanent power of amendment, to arise at the expiry of the period of eight years, is a wholly different thing both as to the donee of the power and the manner of its exercise".

367. He held that it was not competent for the Oireachtas to remove from the power granted to it by the Constituent Assembly the requisites for its exercise attached to it in the very terms of donation of the power. He observed:

> "That provisions of the Statute No. 8 of 1928, was bad, in my opinion, as being what is called in the general law of powers 'an excessive execution'. It was outside the scope of the power. We have not been referred to, nor have I found, any precedent for such a use of a power. I do not believe that there can be a precedent because it defines logic and reason. It was, therefore, invalid in my opinion" (p. 216)

368. Regarding the substitution of "sixteen years" for the words "eight years" he said:

> "If this amendment is good there is no reason why the Oireachtas should not have inserted or should not even yet insert, a very much larger term of years or, indeed, delete the whole of Article 50 from the words 'by the Oireachtas' in the second line to the end of the Article." (p. 216)

Later he observed:

> "The attempt to take from the people this right, this exclusive power and authority and to confer on the Oireachtas a full and uncontrolled power to amend the Constitution without reference to the people (even though for a period of years, whether it be until 1938 or Tibb's Eve, a matter of indifference in the circumstances) was described by counsel in, I think, accurate language, as a usurpation, for it was done in my opinion without legal authority." (p. 217)

369. He then repelled the argument that Section 50 conferred the power to amend the Article itself. His reasons for this conclusion are summarised thus at page 219:

> "In my opinion, on the true interpretation of the power before us, upon a consideration of express prohibition, limitations and requirements of the clause containing it, the absence of any express authority, the donation of the effective act in the exercise of the power to the people as a whole, the relevant surrounding circumstances to which I have already referred and the documents and their tenor in their entirety, there is not here, either expressly or by necessary implication, any power to amend the power of amendment itself."

370. I cannot agree with the learned Attorney-General that the sole basis of Kennedy, C. J.'s, decision was that Article 50 did not contain an express power of amending the provisions of Article 50 itself. He gave various reasons which I have referred to above.

371. Fitz Gibbon, J., held that the word "amendment" was wide enough to include a power to amend or alter or repeal and there is no express prohibition in Article 50 itself that any Article of the Constitution including Article 50 could not be amended. The only limitation that he could find was that the provisions of the Scheduled Treaty could not be amended. He observed:

> "I see no ground for holding that either of these articles could not have been amended by the Oireachtas subject to a Referendum of the people after the period of eight years, and, if so, it follows that the same amendment, e g., the deletion of the word 'no' in Article 43 could be made 'by way of ordinary legislation' within that period, or within sixteen years, after eight had been altered to sixteen." (p. 228)

372. In other words, according to him, if the Oireachtas subject to a referendum of the people mentioned in Article 50 could amend any article, so could Oireachtas during the period of eight years. But he noticed that in other Constitutions, there are articles, laws or provisions which are specifically described as "Fundamental" e. g., Sweden, or "Constitutional" e. g., Austria, Czechoslovakia and France, in respect of which the Constitution expressly restricts the power of amendment, but in the Constitution of the Saorstat there is no such segregation, and the power of amendment which applies to any article appears to me to be equally applicable to all others, subject, of course, to the restriction in respect of the Scheduled Treaty. He later observed:

> "Unless, therefore, these rights appear plainly from the express provisions of our Constitution to be inalienable, and incapable of being modified or taken away by any legislative act, I cannot accede to the argument that the Oireachtas cannot alter, modify, or repeal them. The framer of our Constitution may have intended 'to bind man down from mischief by the chains of the Constitution,' but if they did, they defeated their object by handing him the key of the padlock in Article 50". (p. 234)

373. Murnaghan, J, stressed the point that "this direct consultation of the people's will, does indicate that all matters, however fundamental, might be the subject of amendment. On the other hand the view contended for by the appellants must go to this extreme point, viz., that certain articles or doctrines of the Constitution are utterly incapable of alteration at any time even if demanded by an absolute majority of the voters".

374. This observation really highlights the distinction between Article 50 of the Irish Constitution and Article 368 of the Indian Constitution. As I have already observed, there is no direct consultation of the people's will in Article 368 of our Constitution.

375. The only limitation he could find in Article 50 was that the amendment to the Constitution must be within the terms of the Scheduled Treaty.

376. As I have observed earliey, I find Article 50 of the Irish Constitution quite different in structure from Article 368 of the Indian Constitution and I do not think it is permissible to argue from Article 50 of the Irish Constitution to Article 368 of the Indian Constitution. Be that as it may, if I had to express my concurrence, I would express concurrence with the view of the learned Chief Justice in so far as he said that the Oireachtas could not increase its power of amendment by substituting sixteen years for the words "eight years".

377. I had also invited attention of Counsel to *Moore and Others* v. *Attorney-General for the Irish Free State and Others*,[5] and the respondents rely heavily on it. In this case the validity of the Constitution (Amendment No. 22) Act, 1933 (Act 6 of 1933) was involved. It was alleged that this amendment was no bar to the maintenance by the petitioners, who were the appellants, of their appeal before the Judicial Committee, as it was void.

378. On May 3, 1933, the Oireachtas passed an Act No. 6 of 1933, entitled the Constitution (Removal of Oath) Act, 1933. That Act, by Section 2, provided that Section 2 of the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, should be repealed, and, by Section 3, that Article 50 of the Constitution should be amended by deleting the words "within the terms of the Scheduled Treaty".

379. Finally, on November 15, 1933, the Oireachtas, enacted the Constitution (Amendment No. 22) Act, 1933, amending Article 66 of the Constitution so as to terminate the right of appeal to his Majesty in Council.

380. The validity of the last amending Act depended on whether the earlier Act No. 6 of 1933, was valid, namely, that which is directed to removing from Article 50 the condition that there can be no amendment of the Constitution unless it is within the terms of the Scheduled Treaty.

381. It appears that Mr. Wilfrid Greene, arguing for the petitioners, conceded that the Constitution (Amendment No. 16) Act, 1929 was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

382. It is true that the Judicial Committee said that Mr. Greene rightly conceded this point but we do not know the reasons which impelled the the Judicial Committee to say that the concession was rightly made. In view of the differences between Article 50 of the Irish Constitution and Article 368 of our Constitution, this concession cannot have any importance in the present case. The actual decision in the case is of no assistance to us because that proceeds on the basis that the Statute of Westminster had removed the restriction contained in the Constitution of the Irish Free State Act, 1922.

383. Mr. Greene challenged the validity of Act No. 6 of 1933 by urging:

> "The Constitution, derived its existence not from any legislature of the Imperial Parliament but solely from the operations of an Irish body, the Constituent Assembly, which is called in Ireland the Third Dail Eireann. This body, it is said, though mentioned in the Irish Free State (Agreement) Act, 1922, was in fact elected pursuant to a resolution passed on May 20, 1922, by the Second Dail Fireann, an Irish Legislative Assembly. The Third Dail Eireann was thus, it was alleged, set up in Ireland by election of the people of Ireland of their own authority as a Constituent Assembly to create a Constitution, and having accomplished its work went out of existence, leaving no successor

---

[5] 1935 AC 484.

and no body in authority capable of amending the Constituent Act. The result of that argument is that a Constitution was established which Mr. Greene has described as a semi-rigid Constitution—that is, 'one capable of being amended in detail in the different articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new Constituent Assembly by the people of Ireland. Thus the articles of the Constitution may only be amended in accordance with Article 50, which limits amendments to such as are within the terms of the Scheduled Treaty. On that view Mr. Greene argues that the law No. 6 of 1933 is ultra vires and hence that the Amendment No. 22 of 1933 falls with it." (p. 496)

384. Mr. Greene referred their Lordships to *State* (*Ryan and Others*) v. *Lennon and Others*,[6]. In that case Chief Justice Kennedy is reported to have expressed a view which corresponds in substance to that contended for by Mr. Greene.

385. Now it is these contentions which I have just set out and which their Lordships could not accept. They observed:

> "In their opinion the Constituent Act and the Constitution of the Irish Free State derived their validity from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922. This Act established that the Constitution, subject to the provisions of the Constituent Act, should be the Constitution of the Irish Free State and should come into operation on being proclaimed by His Majesty, as was done on December 6, 1922. The action of the House of Parliament was thereby ratified." (p. 497)

The position was summed up as follows:

> "(1) The Treaty and the Constituent Act respectively form parts of the Statute Law of the United Kingdom, each of them being parts of an Imperial Act. (2) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a dominion Legislature to pass a law repugnant to an Imperial Act. (3) The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature, by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act. In this case they have done so." (p. 498)

385-A. I think that summary makes it quite clear that it was because of the Statute of Westminster that the Irish Free State Parliament was enabled to amend the Constitution Act.

Part IV—Validity of 24th Amendment

386. Now I may deal with the question whether the Constitution (Twenty-Fourth Amendment) Act, 1971 is valid. It reads thus:

> "……………………………………………
>
> (2) In Article 13 of the Constitution, after clause (3), the following

---

[6] 1935 IR 170.

clause shall be inserted, namely:

'(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.'

(3) Article 368 of the Constitution shall be re-numbered as clause (2) thereof; and—

(*a*) for the marginal heading to that article, the following marginal heading shall be substituted, namely—

'Power of Parliament to amend the Constitution and procedure therefor.';

(*b*) before clause (2) as so re-numbered, the following clause shall be inserted, namely:

'(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.';

(*c*) in clause (2) as so re-numbered, for the words 'it shall be presented to the President for his assent and upon such assent being given to the Bill,' the words 'it shall be presented to the President who shall give his assent to the Bill and thereupon' shall be substituted;

(*d*) after clause (2) as so re-numbered, the following shall be inserted, namely:

'(3) Nothing in Article 13 shall apply to any amendment made under this article'."

387. According to the petitioner, the 24th Amendment has sought to achieve five results:

(*i*) It has inserted an express provision in Article 368 to indicate that the source of the amending power will be found in that Article itself.

(*ii*) It has made it obligatory on the President to give his assent to any Bill duly passed under that Article.

(*iii*) It has substituted the words "amend by way of addition, variation or repeal............" in place of the bare concept of "amendment" in the Article 368.

(*iv*) It makes explicit that when Parliament makes a constitutional amendment under Article 368 it acts "in exercise of its constituent power".

(*v*) It has expressly provided, by amendments in Articles 13 and 368, that the bar in Article 13 against abridging or taking away any of the fundamental rights should not apply to any amendment made under Article 368.

388. Mr. Palkhivala did not dispute that the amendments covered by (*i*) and (*ii*) above were within the amending power of Parliament. I do not find it necessary to go into the question whether Subba Rao, C J., rightly decided that the amending power was in List I, Entry 97 or Article 248, because nothing turns on it now.

389. Mr. Palkhivala rightly conceded that Parliament could validly amend Article 368 to transfer the source of amending power from List I, Entry 97 to Article 368.

390. Mr Palkhivala however contended that "if the amendments covered by (*iii*) and (*iv*) above are construed as empowering Parliament to exercise the full constituent power of the people themselves, and as vesting in Parliament the ultimate legal sovereignty of the people, and as authorising Parliament to alter or destroy all or any of the essential features, basic elements and fundamental principles of the Constitution (hereinafter referred to 'essential features'), the amendments must be held to be illegal and void". He further urges that "if the amendment covered by (*v*) is construed as authorising Parliament to damage or destroy the essence of all or any of the fundamental rights, the amendment must be held to be illegal and void". He says that the 24th Amendment is void and illegal for the following reasons: "A creature of the Constitution, as the Parliament is, can have only such amending power as is conferred by the Constitution which is given by the people unto themselves. While purporting to exercise that amending power, Parliament cannot increase that very power. No doubt, Parliament had the power to amend Article 368 itself, but that does not mean that Parliament could so amend Article 368 as to change its own amending power beyond recognition. A creature of the Constitution cannot enlarge its own power over the Constitution, while purporting to act under it, any more than the creature of an ordinary law can enlarge its own power while purporting to act under that law. The power of amendment cannot possibly embrace the power to enlarge that very power of amendment, or to abrogate the limitations, inherent or implied, in the terms on which the power was conferred. The contrary view would reduce the whole principle of inherent and implied limitations to an absurdity".

391. It is contended on behalf of the respondents that the 24th Amendment does enlarge the power of Parliament to amend the Constitution, if *Golak Nath's case* (supra), limited it, and as Article 368 clearly contemplates amendment of Article 368 itself, Parliament can confer additional powers of amendment on it.

392. Reliance was placed on *Ryan's case* (supra) and *Moore's case* (supra) I have already dealt with these cases.

393. It seems to me that it is not legitimate to interpret Article 368 in this manner. Clause (*e*) of the proviso does not give any different power than what is contained in the main article. The meaning of the expression "Amendment of the Constitution" does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two-third majority to simple majority. Similarly it cannot get rid of the true meaning of the expression "Amendment of the Constitution" so as to derive power to abrogate fundamental rights.

394. If the words "notwithstanding anything in the Constitution" are designed to widen the meaning of the word "Amendment of the Constitution" it would have to be held void as beyond the amending power. But I do not read these to mean this. They have effect to get rid of the argument that Article 248 and Entry 97, List I contains the power of amendment. Similarly, the insertion of the words "in exercise of its constituent power"

---

7. 1935 IR 170.

8. 1935 AC 484.

only serves to exclude Article 248 and Entry 97, List I and emphasise that it is not ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution.

395. It was said that if Parliament cannot increase its power of amendment clause (*d*) of Section 3 of the 24th Amendment which makes Article 13 inapplicable to an amendment of the Constitution would be bad. I see no force in this contention. Article 13(2) as existing previous to the 24th Amendment as interpreted by the majority in *Golak Nath's case* (supra), prevented Legislatures from taking away or abridging the rights conferred by Article 13. In other words, any law which abridged a fundamental right even to a small extent was liable to be struck down. Article 368 can amend every article of the Constitution as long as the result is within the limits already laid down by me. The amendment of Article 13(2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorise abrogation or the taking away of fundamental rights. After the amendment now a law which has the effect of merely abridging a right while remaining within the limits laid down would not be liable to be struck down.

396. In the result, in my opinion, the 24th Amendment as interpreted by me is valid.

Part V—Validity of Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971

397. Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971 enacted as follows:

In Article 31 of the Constitution,—

(*a*) for clause (2), the following clause shall be *substituted*, namely:

> "(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:
>
> Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause."

(*b*) after clause (2-A), the following clause shall be *inserted*, namely:

> "(2-B) Nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)."

398. There cannot be any doubt that the object of the amendment is to modify the decision given by this Court in *Rustom Cavasjee Cooper* v. *Union of India*,[9] where it was held by ten Judges that the Banking Companies

---

[9] (1970) 3 SCR 530: (1970) 1 SCC 284.

(Acquisition and Transfer of Undertakings) Act violated the guarantees of compensation under Article 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed the amounts so declared could not be regarded as compensation.

399 If we compare Article 31(2) as it stood before and after the 25th Amendment, the following changes seem to have been effected. Whereas before the amendment Article 31(2) required the law providing for acquisition to make provision for compensation by either fixing the amount of compensation or specifying the principles on which and the manner in which the compensation should be determined after the amendment Article 31(2) requires such a law to provide for an "amount" which may be fixed by the law providing for acquisition or requisitioning or which may be determined in accordance with such principles and given in such manner as may be specified in such law. In other words, for the idea that compensation should be given, now the idea is that an "amount" should be given. This amount can be fixed directly by law or may be determined in accordance with such principles as may be specified.

400. It is very difficult to comprehend the exact meaning which can be ascribed to the word "amount". In this context, it is true that it is being used in lieu of compensation, but the word "amount" is not a legal concept as "compensation" is.

401. According to Shorter Oxford English Dictionary, Third Edn., p 57, the word "amount" has the following meaning:

> "Amount [amount sb. 1710 (f. the vb.)] 1. The sum total to which anything amounts up; spec. the sum of the principal and interest 1796. 2. fig. The full value, effect, or significance 1732. 3. A quantity or sum viewed as a total 1833."

402. According to Webster's Third New International Dictionary, p. 72, "amount" means:

> "amount 1-*a*: the total number of quantity; AGGREGATE (the amount of the fine is doubled); SUM, NUMBER (add the same amount to each column) (the amount of the policy is 10,000 dollars); (*b*) the sum of individuals (the unique amount of worthless IOU'S collected during each day's business—R. L. Taylor); (*c*) the quantity at hand or under consideration (only a small amount of trouble involved) (a surprising amount of patience) 2: the whole or final effect, significance, or import (the amount of his remarks is that we are hopelessly beaten) 3: accounting (*a*) principal sum and the interest on it syn see SUM."

403. We have also seen the meaning of the word "amount" in the *Oxford English Dictionary*, Vol. 1, p. 289, but it does not give us much guidance as to the meaning to be put in Article 31(2), as amended. The figurative meaning, i. e. the full value, I cannot give because of the deliberate omission of the word "compensation" and substitution of the word "amount" in lieu thereof.

404. Let us then see if the other part of the article throws any light on the word "amount". The article postulates that in some cases principles may be laid down for determining the amount and these principles may lead to an adequate amount or an inadequate amount. So this shows that the word "amount" here means something to be given in lieu of the property to be acquired but this amount has to and can be worked out by laying down certain principles. These principles must then have a reasonable relationship to the property which is sought to be acquired. If this is so, the amount ultimately arrived at by applying the principle must have some reasonable relationship with the property to be acquired; otherwise the principles of the Act could hardly be principles within the meaning of Article 31(2).

405. If this meaning is given to the word "amount" namely, that the amount given in cash or otherwise is of such a nature that it has been worked out in accordance with the principles which have relationship to the property to be acquired, the question arises: what meaning is to be given to the expression "the amount so fixed". The amount has to be fixed by law but the amount so fixed by law must also be fixed in accordance with some principles because it could not have been intended that if the amount is fixed by law, the Legislature would fix the amount arbitrarily. It could not, for example, fix the amount by a lottery.

406. Law is enacted by passing a bill which is introduced. The Constitution and legislative procedure contemplate that there would be discussion, and in debate, the Government spokesman in the Legislature would be able to justify the amount which has been fixed. Suppose an amendment is moved to the amount fixed. How would the debate proceed? Can the Minister say—"This amount is fixed as it is the government's wish". Obviously not. Therefore, it follows that the amount, if fixed by the Legislature, has also to be fixed according to some principles. These principles cannot be different from the principles which the Legislature would lay down.

407. In this connection it must be borne in mind that Article 31(2) is still a fundamental right. Then, what is the change that has been brought about by the amendment? It is no doubt that a change was intended. It seems to me that the change effected is that a person whose property is acquired can no longer claim full compensation or just compensation but he can still claim that the law should lay down principles to determine the amount which he is to get and these principles must have a rational relation to the property sought to be acquired. If the law were to lay down a principle that the amount to be paid in lieu of a brick of gold acquired shall be the same as the market value of an ordinary brick or a brick of silver it could not be held to be a principle at all. Similarly if it is demonstrated that the amount that has been fixed for the brick of gold is the current value of an ordinary brick or a brick of silver the amount fixed would be illegal. If I were to interpret Article 31(2) as meaning that even an arbitrary or illusory or a grossly low amount could be given, which would shock not only the judicial conscience but the conscience of every reasonable human being, a serious question would arise whether Parliament has not exceeded its amending power under Article 368 of the Constitution. The substance of the fundamental right to property, under Article 31, consists of three things: one, the property shall be acquired by or under a valid law; secondly, it shall be acquired only for a public purpose; and, thirdly, the person whose property has been acquired shall be given an amount in lieu thereof, which, as I have already said, is not arbitrary, illusory or shocking to the judicial conscience or the conscience of mankind. I have already held that Parliament has no power under Article 368 to abrogate the fundamental rights but can amend or regulate or adjust them in its exercise of amending powers without destroying them. Applying this to the fundamental right of property, Parliament cannot empower

Legislatures to fix an arbitrary or illusory amount or an amount that virtually amounts to confiscation, taking all the relevant circumstances of the acquisition into consideration. Same considerations apply to the manner of payment. I cannot interpret this to mean that an arbitrary manner of payment is contemplated. To give an extreme example, if an amount is determined or fixed at Rs. 10,000/-, a Legislature cannot lay down that payment will be made at the rate of Rs. 10/- per year or Rs. 10/- per month

408. Reference may be made to two cases that show that if discretion is conferred it must be exercised reasonably.

409. In *Roberts* v. *Hopwood*,[10] it was held that the discretion conferred upon the Council by Section 62 of the Metropolis Management Act, 1855, must be exercised reasonably. The following observations of Lord Buckmaster are pertinent:

> "It appears to me, for the reasons I have given, that they cannot have brought into account the consideration which they say influenced them, and that they did not base their decision upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion imposed upon them by the statute."

410. We may also refer to Lord Wrenbury's observations at p. 613:

> "I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

411. In *James Leslie Williams* v. *Haines Thomas*,[11] the facts are given in the headnote as follows:

> "Under Section 4 of the New South Wales Public Service Superannuation Act 1903; the plaintiff was awarded by the Public Service Board a gratuity of 23£ 10s. 1d. per mensem, calculated for each year of service from December 9, 1875, the date of his permanent employment, up to December 23, 1895; and upon his claiming to have his service reckoned up to August 16, 1902, was awarded a further gratuity of one penny in respect of each year subsequent to December 23, 1895, up to August 16, 1902, the date of the commencement of the Public Service Act of that year."

412. The Judicial Committee held the award to be illusory. The Judicial Committee observed:

> "..........it seems to their Lordships to be quite plain that an illusory award such as this—an award intended to be unreal and unsubstantial—though made under guise of exercising discretion, is at best a colourable performance, and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament." (p. 385)

---

[10] 1925 AC 578, 590.

[11] 1911 AC 381.

413. Although I am unable to appreciate the wisdom of inserting clause (2-B) in Article 31, the effect of which is to make Article 19(1)(*f*) inapplicable, I cannot say that it is an unreasonable abridgement of rights under Article 19(1)(*f*). While passing a law fixing principles, the Legislatures are bound to provide a procedure for the determination of the amount, and if the procedure is arbitrary that provision may well be struck down under Article 14.

414. In view of the interpretation which I have placed on the new Article 31(2), as amended, it cannot be said that Parliament has exceeded its amending power under Article 368 in enacting the new Article 31(2).

415. For the reasons aforesaid I hold that Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted by me, is valid.

Part VI—Validity of Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971

416. Section 3 of the Twenty-fifth Amendment, reads thus:

> "3. After Article 31-B of the Constitution, the following arrticle shall be inserted, namely:
>
> "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not given effect to such policy:
>
> "Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

417. It will be noted that Article 31-C opens with the expression "notwithstanding anything contained in Article 13". This however cannot mean that not only fundamental rights like Article 19(1)(*f*) or Article 31 are excluded but all fundamental rights belonging to the minorities and religious groups are also excluded. The article purports to save laws which a State may make towards securing the principles specified in clause (*b*) or (*c*) of Article 39 from being challenged on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14, 19 or 31. This is the only ground on which they cannot be challenged. It will be noticed that the article provides that if the law contains a declaration that it is for giving effect to such policy, it shall not be called in question in any court on the ground that it does not give effect to such policy. In other words, once a declaration is given, no court can question the law on the ground that it has nothing to do with giving effect to the policy; whether it gives effect to some other policy is irrelevant. Further, a law may contain some provisions dealing with the principles specified in clause (*b*) or (*c*) of Article 39 while other sections may have nothing to do with it, yet on the language it denies any court power or jurisdiction to go into this question.

418. In the face of declaration, this Court would be unable to test the validity of incidental provisions which do not constitute an essential and integral part of the policy directed to give effect to Article 39(*b*) and Article 39(*c*).

419. In *Akadasi Padhan* v. *State of Orissa*[12] Gajendragadkar, C. J., speaking for the Court, observed:

> "A law relating to a State monoply cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6).

420. These observations were quoted with approval by Shah, J., speaking on behalf of a larger Bench in *R. C. Cooper* v. *Union of India*.[13] After quoting the observations, Shah, J., observed:

> "This was reiterated in *Rashbihar Panda and Others* v. *The State of Orissa*[14], *M/s. Vrajlal Manilal & Co. and Another* v. *The State of Madhya Pradesh & Others*[15] and *Municipal Committee, Amritsar and Others* v. *State of Punjab*[16]."

421. While dealing with the validity of the Bombay Prohibition Act (XXV of 1949), this Court in *State of Bombay* v. *F. N. Balsara*,[17] struck down two provisions on the ground that they conflicted with the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. These provisions were Sections 23(*a*) and 24(1)(*a*), which read:

> "23. No person shall—
>
> (*a*) commend, solicit the use of, offer any intoxicant or hemp, or.........
>
> 24. (1) No person shall print or publish in any newspaper newes-sheet, book, leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter—
>
> (*a*) which commends, solicits the use of or offers any intoxicant or hemp........."

422. Section 23(*b*) was also held to be void. It was held that "the words 'incite' and 'encourage' are wide enough to include incitement and encouragement by words and speeches also by acts and the words used in the section are so wide and vague that and the clause must be held to be void in its entirety".

---

[12] 1963 Supp 2 SCR 691-707: AIR 1963 SC 1047: (1964) 2 SCJ 37.

[13] (1970) 3 SCR 530-582: (1970) 1 SCC 248.

[14] (1969) 3 SCR 374: (1969) 1 SCC 414.

[15] (1970) 1 SCR 400: (1969) 2 SCC 248.

[16] (1969) 3 SCR 447: (1969) 1 SCC 475.

[17] 1951 SCR 682: AIR 1951 SC 318: 1951 SCJ 478.

423. Section 23(*b*) reads as follows:

> 23. No person shall—
>
> (*a*) ....
>
> (*b*) incite or encourage any member of the public or any class of individuals of the public generally to commit any act, which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder or..................

424. Mr. Palkhivala contends, and—I think rightly, that this Court would not be able to strike these provisions down if a similar declaration were inserted now in the Bombay Prohibition Act that this law is for giving effect to Article 47, which prescribes the duty of the State to bring about prohibition of the consumption of intoxicating drinks. If a similar provision were inserted in the impugned Kerala Acts making it a criminal offence to criticise, frustrate or defeat the policy of the Acts, the provisions would be protected under Article 31(*c*).

425. The only so called protection which is given is that if the Legislature of a State passes such a law it must receive the President's assent. It is urged before us that it is no protection at all because the President would give his assent on the advice of the Union Cabinet.

425-A. Article 31-C in its nature differs from Article 31-A, which was inserted by the Fourth Amendment.

> "31-A. (1) Notwithstanding anything contained in Article 13, no law providing for—
>
> (*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
>
> (*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
>
> (*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
>
> (*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or
>
> (*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,
>
> shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:
>
> Provided that........................"

426. In Article 31-A the subject-matter of the legislation is clearly provided, namely, the acquisition by the State of any estate or any rights therein. [Article 31(*a*)]. Similarly, the subject-matter of legislation is specifically provided in clauses (*b*), (*c*) and (*d*) of Article 31-A. But in Article 31-C the sky is the limit because it leaves to each State to adopt measures towards securing the principles specified in clauses (*b*) and (*c*) of Article 39. The wording of Articles 39(*b*) and 39(*c*) is very wide. The expression "economic system" in Article 39(*c*) may well include professional and other services. According to Encyclopedia Americana (1970 Ed., Vol. 9, p. 600) "economic systems are forms of social organization for producing goods and services and determining how they will be distributed. It would be difficult to resist the contention of the State that each provision in the law has been taken for the purpose of giving effect to the policy of the State.

427. It was suggested that if the latter part of Article 31-C, dealing with declaration, is regarded as unconstitutional, the Court will be entitled to go into the question whether there is any nexus between the impugned law and Article 39(*b*) and Article 39(*c*). I find it difficult to appreciate this submission. There may be no statement of State policy in a law. Even if there is a statement of policy in the Preamble, it would not control the substantive provisions, if unambiguous. But assuming that there is a clear statement it would be for the State Legislature to decide whether a provision would, help to secure the objects.

428. The Courts will be unable to separate necessarily incidental provisions and merely incidental. Further, as I have pointed out above, this question is not justiciable if the law contains a declaration that it is for giving effect to such a policy. According to Mr. Palkhivala, Article 31-C has four features of totalitarianism: (1) there is no equality. The ruling party could favour its own party members, (2) there need not be any freedom of speech, (3) there need be no personal liberty which is covered by Article 19(1)(*b*), and (4) the property will be at the mercy of the State. In other words, confiscation of property of an individual would be permissible.

429. It seems to me that in effect, Article 31-C enables States to adopt any policy they like and abrogate Articles 14, 19 and 31 of the Constitution at will. In other words, it enables the State to amend the Constitution. Article 14, for instance, would be limited by the State according to its policy and not the policy of the amending body, i.e., the Parliament and so would be Articles 19 and 31, while these fundamental rights remain in the Constitution. It was urged that when an Act of Parliament or a State Legislature delegates a legislative power within premissible limits the delegated legislation derives its authority from the Act of Parliament. It was suggested that similarly the State law would derive authority from Article 31-C. It is true that the State law would derive authority from Article 31-C but the difference between delegated legislation and the State law made under Article 31-C is this: It is permissible, within limits, for a legislature to delegate its functions, and for the delegate to make law. Further the delegated legislation would be liable to be challenged on the ground of violation of fundamental rights regardless of the validity of the State Act. But a State Legislature cannot be authorised to amend the Constitution and the State law deriving authority from Article 31-C cannot be challenged on the ground that it infringes Articles 14, 19 and 31.

430. It will be recalled that Article 19 deals not only with the rights to property but it guarantees various rights: freedom of speech and expression; right to assemble peaceably and without arms; right to form associations or unions; right to move freely throughout the territory of India; right to practice any profession or to carry on any occupation, trade or business. I am unable to appreciate the reason for giving such powers to the State Legislature to abrogate the above freedoms. In effect, Parliament is enabling State Legislatures to declare that "a citizen shall not be free; he will have no freedom of speech to criticise the policy of the State; he shall not assemble to protest against the policy; he shall not be confined to a town or a district and shall not move outside his State; a resident of another State shall not enter the State which is legislating; he shall not, if a lawyer, defend people who have violated the law. It could indeed enable Legislatures to apply one law to political opponents of the ruling party and leave members of the party outside the purview of the law. In short, it enables a State Legislature to set up complete totalitarianism in the State. It seems that its implications were not realised by Parliament though Mr. Palkhivala submits that every implication was deliberately intended.

431. I have no doubt that the State Legislature and Parliament in its ordinary legislative capacity will not exercise this new power conferred on them fully but I am concerned with the amplitude of the power conferred by Article 31-C and not with what the Legislatures may or may not do under the powers so conferred.

432. I have already held that Parliament cannot under Article 368 abrogate fundamental rights. Parliament equally cannot enable the Legislatures to abrogate them. This provision thus enables Legislatures to abrogate fundamental rights and therefore must be declared unconstitutional.

433. It has been urged before us that Section 3 of the 25th Amendment Act is void as it in effect delegates the constituent amending power to State Legislatures. The question arises whether Article 368 enables Parliament to delegate its function of amending the Constitution to another body. It seems to me clear that it does not. It would be noted that Article 368 of this Constitution itself provides that amendment may be initiated only by the introduction of a bill for the purpose in either House of Parliament. In other words, Article 368 does not contemplate any other mode of amendment by Parliament and it does not equally contemplate that Parliament could set up another body to amend the Constitution.

434. It is well-settled in India that Parliament cannot delegate its essential legislative functions.

See—

Per Mukherjea, J., in *re The Delhi Laws Act, 1912,* 1951 SCR 747 at 984-5: AIR 1951 SC 332: 1951 SCJ 527.

Raj Narain Singh v. *Patna Administration,* (1955) 1 SCR 290: AIR 1954 SC 569: 1954 SCJ 661.

Hari Shankar Bagla v. *State of Madhya Pradesh,* (1955) 1 SCR 380: AIR 1954 SC 465: 1954 SCJ 637: 1954 Cr LJ 1322.

Vasantlal Sanjanwala v. *State of Bombay,* (1961) 1 SCR 341: AIR 1961 SC 4: (1961) 1 SCJ 395.

The Municipal Corporation of Delhi v. *Birla Cotton Mills,* (1968) 3 SCR 251: AIR 1968 SC 1232: (1969) 1 SCJ 621.

Garewal v. *State of Punjab,* 1959 Supp 1 SCR 792: AIR 1959 SC 512: 1959 SCJ 399.

435. It is also well-settled in countries, where the courts have taken a position different than in Indian courts, that a Legislature cannot create another legislative body. Reference may be made here to *In re Initiative and Referendum Act,*[18] and *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*.[19] I have discussed the latter case while dealing with the question of implied limitation. *Initiative and Referendum case* (supra), is strongly relied on by Mr. Palkhivala to establish that an amending power cannot be delegated. In this case the Judicial Committee of the Privy Council was concerned with the interpretation of Section 92, head 1, of the British North America Act, 1857, which empowers a Provincial Legislature to amend the Constitution of the Province, "excepting as regards the office of the Lieutenant-Governor". The Legislative Assembly of Manitoba enacted the Initiative and Referendum Act, which in effect would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by these voters.

436. The judgment of the Court of Appeal is reported in 27 Man. L. R. 1, which report is not available to me, but the summary of the reasons of the learned Judges of the Court of Appeal are given at page 936 of (1919) A. C. as follows:

> "The British North America Act, 1867, declared that for each province there should be a Legislature, in which Section 92 vested the power of law-making; the Legislature could not confer that power upon a body other than itself. The procedure proposed by the Act in question would not be an Act of a Legislature within Section 92, would be wholly opposed to the spirit and principles of the Canadian Constitution, and would override the Legislature thereby provided. Further, the power to amend the Constitution given by Section 92, head 1, expressly expected 'the office of the Lieutenant-Governor'. Section 7 of the proposed Act, while preserving the power of veto and disallowance by the Governor-General provided for by Sections 55 and 90 of the Act of 1867, dispensed with the assent of the Lieutenant-Governor provided for by Sections 56 and 90 of that Act; even if Section 7 was not intended to dispense with that assent, Section 11 clearly did so. The proposed Act also violated the provisions of Section 54 (in conjunction with Section 90) as to money bills."

437. Their Lordships of the Judicial Committee held at page 944:

> "Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the Constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in Section 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under Section 90 of the Act of 1867,

---

[18] 1919 AC 935.

[19] 1951 Canada SCR 13.

> and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority."

438. We have set out this passage in extenso because this deals with one part of the reasoning given by the Court of Appeal. Regarding the other part, i. e., whether the Legislature could confer that power on a body other than itself, the Judicial Committee observed at page 945:

> "Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Section 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*,[20] the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; *but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence*. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.
>
> (Emphasis supplied)

439. It is interesting to note that this position was indicated by Sir A. Hobhouse, a member of the Judicial Committee, while *Hodge* v. *The Queen*,[21] was being argued. This appears from Lefroy on *Canadian Federal System* at p. 387:

> "Upon the argument before the Privy Council in *Hodge* v. *The Queen* (supra), Mr. Horace Davey contended that under this sub-section, [Section 92(1) of Canadian Constitution] Provincial Legislatures 'could do what Lord Selborne, no doubt correctly, said in *The Queen* v. *Burah*,[21] the Indian Legislature could not do,—abdicate their whole legislative functions in favour of another body'. But, as Sir A. Hobhouse remarked, this they cannot do. 'They remain invested with a responsibility. Everything is done by them, and such officers as they create and give discretion to'."

440. The learned Attorney-General submitted that this case decided only that in the absence of clear and unmistakable language in Section 92, head 1, the power which the Crown possesses through a person directly representing the Crown cannot be abrogated. It is true that this was the actual decision but the subsequent observations, which we have set out above, clearly show that the Judicial Committee was prepared to imply limitations as the Court of Appeal had done on the amending power conferred on the Provincial Legislature by Section 92, head I.

---

[20] 9 AC 117.

[21] (1878) 3 AC 905.

441. The Attorney-General said that the scope of this decision was referred to in *Nadan* v. *The King*,[22] where at page 495 reference is made to this case in the following words:

> "In the case of *In re Initiative and Referendum Act* Lord Haldane, in declaring the judgment of the Board referred to 'the impropriety in the absence of clear and unmistakable language of construing Section 92 as permitting the abrogation of any power which the Crown possesses through a person directly representing it'; an observation which applies with equal force to Section 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Crown itself."

442. But this passage again dealt with the actual point decided and not the obiter dicta.

443. The first para of the headnote in *Nadan's case*[23] gives in brief the actual decision of the Privy Council as follows:

> "Section 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, is invalid. The legislative authority of the Parliament of Canada as to criminal law and procedure, under Section 91 of the British North America Act, 1867, is confined to action to be taken in Canada. Further an enactment annulling the royal prerogative to grant special leave to appeal would be inconsistent with the Judicial Committee Act, 1833 and 1844, and therefore would be invalid under Section 2 of the Colonial Laws Validity Act, 1865. The royal assent to the Criminal Code could not give validity to an enactment which was void by Imperial Statute; exclusion of the prerogative could be accomplished only by an Imperial statute."

444. For the aforesaid reasons I am unable to agree with the Attorney-General and I hold that the Initiative and Referendum Act case shows that limitations can be implied in an amending power.

445. Mr. Seervai seeks to distinguish this case on another ground According to him, these observations were obiter dicta, but even if they are treated as considered obiter dicta, they add nothing to the principles governing delegated legislation, for this passage merely repeats what had been laid down as far back as 1878 in *The Queen* v. *Burah*,[24] where the Privy Council in a classical passage, observed:

> "But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as

---

[22] 1926 AC 482.

[23] 1926 AC 482.

[24] 5 IA 178: (1878) 3 AC 889, 904, 905.

> those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative power were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions."

446. Mr. Seervai further says that having laid down the law as set out above, the Privy Council added:

> "Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Council's Act."

447. We are unable to agree with him that the obiter dicta of the Judicial Committee deals with the same subject as *Burah's case*.[25] *Burah's case* (supra), was not concerned with the power to amend the Constitution but was concerned only with legislation enacted by the Indian Legislature. This clearly appears from the passage just cited from Lefroy. The Governor-General in Council had no power to amend the Government of India Act, under which it functioned.

448. Reference was also made to the observations of one of us in *Delhi Municipality* v. *B. C. & W. Mills*,[26] where I had observed as follows:

> "Apart from authority, in my view Parliament has full power to delegate legislative authority to subordinate bodies. This power flows, in my judgment, from Article 246 of the Constitution. The word 'exclusive' means exclusive of any other legislation and not exclusive of any subordinate body. There is, however, one restriction in this respect and that is also contained in Article 246. Parliament must pass a law in respect of an item or items of the relevant list. Negatively this means that Parliament cannot abdicate its functions."

449. Reference was also invited to another passage where I had observed:

> "The case of 1919 AC 935, provides an instance of abdication of functions by a legislature. No inference can be drawn from this case that delegations of the type with which we are concerned amount to abdication of function."

450. It is clear these observations are contrary to many decisions of this Court and, as I said, I made these observations apart from authority.

451. But neither this Court nor the Judicial Committee in *Queen* v. *Burah*,[27] were concerned with an amending power, and the importance of the obiter observations of the Privy Council lies in the fact that even in exercise of its amending power the legislature could not "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence," and the fact that in Canada the doctrine of limited delegated legislation does not prevail as it does in India.

---

[25] 5 IA 178: (1878) 3 AC 889.
[26] AIR 1968 SC 1232 at 1266: (1968) 3 SCR 251: (1969) 1 SCJ 621.
[27] 5 IA 178: (1878) 3 AC 889.

452. It has been urged before us that in fact there has been no delegation of the amending powers to the State Legislatures by Article 31-C, and what has been done is that Article 31-C lifts the ban imposed by Part III from certain laws. I am unable to appreciate this idea of the lifting of the ban. Fundamental rights remain as part of the Constitution and on the face of them they guarantee to every citizen these fundamental rights. But as soon as the State legislates under Article 31-C, and the law abrogates or takes away these constitutional rights, these fundamental rights cease to have any effect. The amendment is then made not by Parliament as the extent of the amendment is not known till the State legislates. It is when the State legislates that the extent of the abrogation or abridgment of the fundamental rights becomes clear. To all intents and purposes it seems to me that it is State legislation that effects an amendment of the Constitution. If it be assumed that Article 31-C does not enable the States to amend the Constitution then Article 31-C would be ineffective because the law which in effect abridges or takes away the fundamental rights would have been passed not in the form required by Article 368, i. e., by 2/3rd of the majority of Parliament but by another body which is not recognised in Article 368, and would be void on that ground.

453. The learned Solicitor-General, relying on *Mohamed Samsudeen Kariapper* v. *S. S. Wijesinha*,[28] urged that there can be implied amendment of the Constitution and Article 31-C may be read as an implied amendment of Article 368. What the Judicial Committee decided in this case was that a bill having received a certificate in the hands of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to no less than two-thirds of the whole number of members of the House in effect amounted to a bill for the amendment or repeal of any of the provisions of the order, and the words "amendment or repeal" included implied amendment.

454. Menzies, J., speaking for the Judicial Committee, observed:

> "Apart from the proviso to sub-section (4) therefore the board has found no reason for not construing the words 'amend or repeal' in the earlier part of Section 29(4) as extending to amendment or repeal by inconsistent law.........A Bill which if it becomes an Act, does amend or repeal some provision of the order is a bill 'for the amendment or repeal of a provision of the order'." (p. 743)

Later, he observed:

> "The bill which became the Act was a bill for an amendment of Section 24 of the Constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have upon becoming law which gives it its constitutional character, not any particular label which may be given to it. A bill described as one for the amendment of the Constitution, which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities."

---

[28] 1968 AC 717, 743.

455. We are not here concerned with the question which was raised before the Judicial Committee because no one has denied that Article 31-C is an amendment of the Constitution. The only question we are concerned with is whether Article 31-C can be read to be an implied amendment of Article 368, and if so read, is it valid, i. e., within the powers of Parliament to amend Article 368 itself.

456. It seems to me that Article 31-C cannot be read to be an implied amendment of Aricle 368 because it opens with the words "notwithstanding anything contained in Article 13" and Article 31-C does not say that "notwithstanding anything contained in Article 368". What Article 31-C does is that it empowers legislatures, subject to the condition laid down in Article 31-C itself, to take away or abridge rights conferred by Articles 14, 19 and 31. At any rate, if it is deemed to be an amendment of Article 368, it is beyond the powers conferred by Article 368, itself. Article 368 does not enable Parliament to constitute another legislature to amend the Constitution, in its exercise of the power to amend Article 368 itself.

457. For the aforesaid reasons I hold that Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is void as it delegates power to legislatures to amend the Constitution.

Part VII—Twenty-Ninth Amendment

The Constitution (Twenty-Ninth Amendment) reads:

> "2. Amendment of Ninth Schedule
>
> 'In the Ninth Schedule to the Constitution, after Entry 64 and before the Explanation, the following entries shall be inserted, namely:
>
> '65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969);
>
> 66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971)'."

458. The effect of the two Kerala Acts in the Ninth Schedule is that the provisions of Article 31-B get attracted. Article 31-B which was inserted by Section 5 of the Constitution (First Amendment) Act, 1951, reads:

> "5. *Insertion of new Article 31-B.*—After Article 31-A of the Constitution as inserted by Section 4, the following article shall be inserted, namely:
>
> "31-B. *Validation of certain Acts and Regulations.*—Without prejudice the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

459. The First Amendment had also inserted Article 31-A and the Ninth Schedule including 13 State enactments dealing with agrarian reforms.

460. Before dealing with the points debated before us, it is necessary to mention that a new Article 31-A was substituted by the Constitution (Fourth Amendment) Act, 1955, for the original article with retrospective effect. The new article contained original Article 31-A(1) as clause (*a*) and added clauses (*b*) to (*e*) and also changed the nature of the protective umbrella. The relevant part of Article 31-A(1) as substituted has already been set out.

461. Under Article 31-A as inserted by the First Amendment a law was protected even if it was inconsistent with or took away or abridged any rights conferred by any provisions of Part III. Under the Fourth Amendment the protective umbrella extended to only Article 14, Article 19 or Article 31. The Seventeenth Amendment further amended the definition of the word "estate" in Article 31-A. It also added seven Acts to the Ninth Schedule.

462. The argument of Mr. Palkhivala, on this part of the case, was two-fold. First, he contended, that Article 31-B, as originally inserted, had intimate relations with agrarian reforms, because at that stage Article 31-A dealt only with agrarian reforms. The words "without prejudice to the generality of the provisions contained in Article 31-A, "according to him, pointed to this connection. He, in effect, said that Article 31-B having this original meaning did not change the meaning or its scope when a new Article 31-A containing clauses (*b*) to (*e*) were included.

463. I am unable to accede to these contentions. The ambit of Article 31-B has been determined by this Court in three decisions. In *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh*,[29] Patanjali Sastri, C. J., rejected the limited meaning suggested above by Somayya, and observed:

> "There is nothing in Article 31-B to indicate that the specific mention of certain statutes was only intended to illustrate the application of the general words of Article 31-A. The opening words of Article 31-B are only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of 'estates'."

464. He held that the decision in *Sibnath Banerji's case*,[30] afforded no useful analogy.

465. In *Visweshwar Rao* v. *State of Madhya Pradesh*,[31] Mahajan, J., repelled the argument in these words:

> "In my opinion the observations in *Sibnath Banerji's case* (supra) far from supporting the contention raised negatives it. Article 31-B specifically validates certain acts mentioned in the Schedule despite the provisions of Article 31-A and is not illustrative of Article 31-A but stands independent of it."

466. In *N. B. Jeejeebhoy* v. *Assistant Collector, Thana*,[32] to which decision I was a party, Subba Rao, C. J., observed that "Article 31-B is not governed by Article 31-A and that Article 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution."

---

[29] 1952 SCR 889, 914-15: AIR 1952 SC 252: 1952 SCJ 354.

[30] 1945 FCR 195: AIR 1945 PC 156.

[31] 1952 SCR 1020-1037: AIR 1952 SC 252, 296: 1952 SCJ 427.

[32] (1965) 1 SCR 636-648: AIR 1965 SC 1096.

467. I may mention that the validity of the device was not questioned before the Court then

468. But even though I do not accept the contention that Article 31-B can be limited by what is contained in Article 31-A, the question arises whether the Twenty-Ninth Amendment is valid.

469. I have held that Article 368 does not enable Parliament to abrogate or take away fundamental rights. If this is so, it does not enable Parliament to do this by any means, including the device of Article 31-B and the Ninth Schedule. The device of Article 31-B and the Ninth Schedule is bad in so far as it protects Statutes even if they take away fundamental rights. Therefore, it is necessary to declare that the Twenty-Ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights.

470. In this connection I may deal with the argument that the device of Article 31-B and the Ninth Schedule has uptil now been upheld by this Court and it is now too late to impeach it. But the point now raised before us has never been raised and debated before. As Lord Atkin observed in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*[33]:

> "Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment."

471. If any further authority is needed I may refer to *Attorney-General for Australia* v. *The Queen and the Boilermakers Society of Australia.*[34] The Judicial Committee, while considering the question whether certain sections of the Conciliation and Arbitration Act, 1904-1952 were ultra-vires inasmuch as the Commonwealth Court of Conciliation and Arbitration had been invested with the executive powers alongwith the judicial powers, referred to the point why for a quarter of century no litigant had attacked the validity of this obviously illegitimate union, and observed:

> "Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged so for a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment."

472. We had decided not to deal with the merits of individual cases and accordingly Counsel had not addressed any arguments on the impugned Acts passed by the Kerala State Legislature. It would be for the Constitution Bench to decide whether the impugned Acts take away fundamental rights. If they do, they will have to be struck down. If they only abridge fundamental rights, it would be for the Constitution Bench to determine whether they are reasonable abridgments essential in the public interest.

473. Broadly speaking, constitutional amendments hitherto made in Article 19 and Article 15 (sic) and the agrarian laws enacted by various States furnish illustrations of reasonable abridgement of fundamental rights in the public interest.

---

[33] 1931 AC 310, 317.

[34] 1957 AC 288; 323.

474. It was said during the argument that one object of Article 31-B was to prevent time-consuming litigation, which held up implementation of urgent reforms. If a petition is filed in the High Court or a suit is filed in a subordinate court or a point raised before a magistrate, challenging the validity of an enactment, it takes years before the validity of an enactment is finally determined. Surely, this is not a good reason to deprive persons of their fundamental rights. There are other ways available to the Government to expedite the decision. It may for example propose ordinary legislation to enable parties to approach the Supreme Court for transfer of such cases to the Supreme Court for determination of substantial questions of interpretation of the Constitution.

Part VIII—Conclusions

475. To summarise, I hold that:

(*a*) *Golak Nath's case*[35] declared that a constitutional amendment would be bad if it infringed Article 13(2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.

(*b*) *Golak Nath's case* (supra) did not decide whether Article 13(2) can be amended under Article 368 or determine the exact meaning of the expression "amendment of this Constitution" in Article 368.

(*c*) The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend evey article.

(*d*) The Constitution (Twenty-fourth Amendment) Act, 1971, as interpreted by me, has been validly enacted.

(*e*) Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another Legislature or to itself in its ordinary Legislative capacity.

(*f*) Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted by me, is valid.

(*g*) Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is void as it delegates power to Legislatures to amend the Constitution.

(*h*) The Constitution (Twenty-Ninth Amendment) Act, 1971 is ineffective to protect the impugned Acts if they abrogate or take away fundamental rights. The Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them, and in the latter case whether they effect reasonable abridgments in the public interest.

476. The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with this judgment, and the law.

477. The cases are remitted to Constitution Bench to be decided in accordance with this judgment, and the law. The parties will bear their own costs.

---

[35] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

Shelat and Grover, JJ.—All the six writ petitions involve common questions as to the validity of the 24th, 25th and 29th amendments to the Constitution. It is not necessary to set out the facts which have already been succinctly stated in the judgment of the learned Chief Justice.

479. It was considered, when the larger bench was constituted, that the decision of the questions before us would hinge largely on the correctness or otherwise of the decision of this Court in *I. C. Golak Nath and Others v. State of Punjab and Another*,[36] according to which it was held, by majority, that Article 13(2) of the Constitution was applicable to constitutional amendments made under Article 368 and that for that reason the fundamental rights in Part III could not be abridged in any manner or taken away. The decision in *Golak Nath case* (supra), has become academic, for even on the assumption that the majority decision in that case was not correct, the result on the questions now raised before us, in our opinion, would just be the same. The issues that have been raised travel far beyond that decision and the main question to be determined now is the scope, ambit and extent of the amending power conferred by Article 368. On that will depend largely the decision of the other matters arising out of the 25th and the 29th amendments.

480. The respective positions adopted by learned counsel for the parties diverge widely and are irreconcilable. On the side of the petitioners, it is maintained inter alia that the power of the amending body (Parliament) under Article 368 is of a limited nature. The Constitution gave the Indian citizens the basic freedoms and a polity or a form of government which were meant to be lasting and permanent. Therefore, the amending power does not extend to alteration or destruction of all or any of the essential features, basic elements and fundamental principles of the Constitution which power, it is said, vests in the Indian people alone who gave the Constitution to themselves, as is stated in its Preamble.

481. The respondents, on the other hand, claim an unlimited power for the amending body. It is claimed that it has the full constituent power which a legal sovereign can exercise provided the conditions laid down in Article 368 are satisfied. The content and amplitude of the power is so wide that, if it is so desired, all rights contained in Part III (Fundamental Rights) such as freedom of speech and expression; the freedom to form associations or unions and the various other freedoms guaranteed by Article 19(1) as also the right to freedom of religion as contained in Articles 25 to 28 together with the protection of interests of minorities (to mention the most prominent ones) can be abrogated and taken away. Similarly, Article 32 which confers the right to move this Court, if any fundamental right is breached, can be repealed or abrogated. The directive principles in Part IV can be altered drastically or even abrogated. It is claimed that democracy can be replaced by any other form of government which may be wholly undemocractic, the federal structure can be replaced by a unitary system by abolishing all the States and the right of judicial review can be completely taken away. Even the Preamble which declares that the People of India gave to themselves the Constitution, to constitute India into a Sovereign Democratic Republic for securing the great objectives mentioned therein can be amended; indeed it can be completely repealed. Thus according to the respondents, short of total abrogation or repeal of the Constitution, the amending body is omnipotent under Article 368 and the Constitution can, at any point of time, be amended by way of variation, addition or repeal so long as no vacuum is left in the governance of the country.

---

[36] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

SCC Online

482. These petitions which have been argued for a very long time raise momentus issues of great constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation.

483. We may observe at the threshold that we do not propose to examine the matters raised before us on the assumption that Parliament will exercise the power in the way claimed on behalf of the respondents nor did the latter contend that it will be so done. But while interpreting constitutional provisions it is necessary to determine their width or reach; in fact the area of operation of the power, its minimum and maximum dimensions cannot be demarcated or determined without fully examining the rival claims. Unless that is done, the ambit, content, scope and extent of the amending power cannot be properly and correctly decided.

484. For our purposes it is not necessary to go prior to the year 1934. It was in that year that the Indian National Congress made the demand for a Constituent Assembly as part of its policy. This demand was repeated in the Central Legislative Assembly in 1937 by the representatives of the Congress. By what is known as the Simla Conference 1945 the Congress repeated its stand that India could only accept the Constitution drawn by the people. After the end of World War II the demand was put forward very strongly by the Indian leaders including Mahatma Gandhi. Sir Stafford Cripps representing Britain had also accepted the idea that an elected body of Indians should frame the Indian Constitution.[37] In September, 1945 the newly elected British Labour Government announced that it favoured the creation of a constituent body in India. Elections were to be held so that the newly elected provincial Legislatures could act as electoral bodies for the Constituent Assembly. A parliamentary delegation was sent to India in January 1946 and this was followed by what is known as the Cabinet Mission. There were a great deal of difficulties owing to the differences between the approach of the Indian National Congress and the Muslim League led by Mr. M. A. Jinnah. The Cabinet Mission devised a plan which was announced on May 16, 1946. By the end of June, both the Muslim League and the Congress had accepted it with reservations. The Constituent Assembly was elected between July-August, 1946 as a result of the suggestion contained in the statement of the Cabinet Mission. The Attlee Government's efforts to effect an agreement between the Congress and the Muslim League having failed, the partition of the country came as a consequence of the declaration of the British Government on June 3, 1947. As a result of that declaration certain changes took place in the Constituent Assembly. There was also readjustment of representation of Indian States from time to time between December 1946 and November 1949. Many smaller States merged into the provinces, many united to form union of States and some came to be administered as commissioner's provinces. There was thus a gradual process by which the Constituent Assembly became fully representative of the various communities and interest, political, intellectual, social and cultural. It was by virtue of Section 8 of the Indian Independence Act, 1947 that the Constituent Assembly was vested with the legal authority to frame a Constitution for India.

---

[37] The facts have been taken mainly from *The Indian Constitution, Cornerstone of a Nation*, by Granville Austin.

485. The first meeting of the Constituent Assembly took place on December 9, 1946, when the swearing in of members and election of a temporary President to conduct the business until the installation of a permanent head, took place. On December 13, 1946, Pandit Jawahar Lal Nehru moved the famous "Objectives Resolution" giving an outline, aims and objects of the Constitution. This resolution was actually passed on January 22, 1947 by all members of the Constituent Assembly (standing) and it declared among other matters that all power and authority of the sovereign Independent India, its constituent parts and organs of Government are derived from the people. By November 26, 1949, the deliberations of the Constituent Assembly had concluded and the Constitution had been framed. As recited in the Preamble it was on that date that the people of India in the Constituent Assembly adopted, enacted and gave to themselves "this Constitution" which according to Article 393 was to be called "The Constitution of India". In accordance with Article 394 that article and the other articles mentioned therein were to come into force at once but the remaining provisions of the Constitution were to come into force on January 26, 1950.

486. Before the scheme of the Constitution is examined in some detail it is necessary to give the pattern which was followed in framing it. The Constituent Assembly was unfettered by any previous commitment in evolving a constitutional pattern "suitable to the genius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government of India Act, 1935, several features of which could be accepted for the new Constitution. Our Constitution borrowed a great deal from the Constitutions of other countries, e. g. United Kingdom, Canada, Australia, Ireland, United States of America and Switzerland. The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four-corners of the constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence, i.e. a Sovereign Democratic Republic. Parts III and IV which embody the fundamental rights and directive principles of State policy have been described as the conscience of the Constitution.[38] The legislative power distributed between the Union Parliament and the State Legislatures cannot be so exercised as to take away or abridge the fundamental rights contained in Part III. Powers of the Union and the States are further curtailed by conferring the right to enforce fundamental rights contained in Part III by moving the Supreme Court for a suitable relief.[39] Article 32 itself has been constituted a fundamental right. Part IV containing the directive principles of State policy was inspired largely by similar provisions in the Constitution of the Eire Republic (1937). This part, according to B. N. Rao, is like an Instrument of Instructions from the ultimate sovereign, namely, the people of India.[40] The Constitution has all the essential elements of a federal structure as was the case in the Government of India Act, 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or the provinces. All the Legislatures have plenary powers but these are controlled by the basic concepts of the Constitution itself and they function within the limits laid down in it.[41] All the functionaries, be they legislators, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights.[42] It is a written and controlled Constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. Although our Constitution is federal in its structure it provides a system modelled on the British parliamentary system. It is the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. "The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State".[43] With regard to the civil services and the position of the judiciary the British model has been adopted inasmuch as the appointment of judges both of the Supreme Court of India and of the High Courts of the States is kept free from political controversies. Their independence has been assured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.

---

[38] *The Indian Constitution* by Granville Austin, p. 50.

[39] *See* generally, Kania, C. J., in *A. K. Gopalan* v. *The State*, 1950 SCR 88 at pp. 96-97: AIR 1950 SC 27: 1950 SCJ 174.

[40] B. N. Rao, *India's Constitution in the Making*, p. 393.

487. India is a secular State in which there is no State religion. Special provisions have been made in the Constitution guaranteeing the freedom of conscience and free profession, practice and propagation of religion and the freedom to manage religious affairs as also the protection of interests of minorities. The interests of scheduled castes and the scheduled tribes have received special treatment. The Rule of Law has been ensured by providing for judicial review. Adult suffrage, the "acceptance of the fullest implications of democracy" is one of the most striking features the Constitution. According to K. M. Pannikar, "it may well be claimed that the Constitution is a solemn promise to the people of India that the Legislature will do everything possible to renovate and reconstitute the society on new principles".[44]

488. We may now look at the Preamble. It reads:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;

---

[41] *Per* Gajendragadkar, C. J., in Special Reference No. 1 of 1964: (1965) 1 SCR 413 at p. 445: AIR 1965 SC 747: (1965) 1 SCJ 847.

[42] (1965) 1 SCR 413 at 446.

[43] *Ram Jawaya Kapur* v. *The State of Punjab*, (1955) 2 SCR 225 at p. 236: AIR 1955 SC 549: 1955 SCJ 504.

[44] *Hindu Society at Crossroads* (By K. M. Pannikar) at pages 63-64.

> EQUALITY of status and of opportunity; and to promote among them all;
>
> FRATERNITY assuring the dignity of the individual and the unity of the Nation;
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

It may be mentioned that this Preamble and indeed the whole Constitution was drafted in the light of and directions contained in the "Objectives Resolution" adopted on January 22, 1947.

489. According to Granville Austin,[45] directive principles of State policy set forth the humanitarian socialist precepts that were the aims of the Indian social revolution. Granville Austin, while summing up the inter-relationship of fundamental rights and directive principles, says that it is quite evident that the fundamental rights and the directive principles were designed by the members of the Assembly to be the chief instruments in bringing about the great reforms of the social revolution. He gives the answer to the question whether they have helped to bring the Indian society closer to the Constitution's goal of social, economic and political justice for all in the affirmative.[46] Das, C. J., in *re*: *Kerala Education Bill, 1957*[47] made the following observations with regard to Parts III and IV:

> "While our Fundamental Rights are guaranteed by Part III of the Constitution, Part IV of it on the other hand, lays down certain directive principles of State policy. The provisions contained in that Part are not enforceable by any court but the principles therein laid down are, nevertheless, fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Article 39 enjoins the State to direct its policy towards securing, amongst other things, that the citizens, men and women, equally, have the right to an adequate means of livelihood."

Although in the previous decisions of this Court in *State of Madras* v. *Smt. Champakam Dorairajan*[48] and *Mohd. Hanif Qureshi and Others* v. *The State of Bihar*[49] it had been held that the directive principles of State policy had to conform to and run subsidiary to the Chapter of Fundamental Rights, the learned Chief Justice was of the view which may be stated in his own words:

> "Nevertheless in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body the court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."

490. The first question of prime importance involves the validity of the Constitution Amendment Act, 1971 (hereinafter called the 24th Amendment). It amended Article 368 of the Constitution for the first time.

---

[45] *Cornerstone of a Nation* (*Indian Constitution*) by Granville Austin, p. 75.

[46] *Ibid.*, p. 113.

[47] 1959 SCR 995 at p. 1020: AIR 1958 SC 956: 1959 SCJ 321.

[48] 1951 SCR 525 at p. 531: AIR 1951 SC 226: 1951 SCJ 313.

[49] 1959 SCR 629: AIR 1958 SC 731: 1958 SCJ 975.

According to the Statement of the Objects and Reasons in the Bill relating to the 24th Amendament, the result of the judgment of this Court in *Golak Nath's case*[50] has been that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it become necessary to do so for giving effect to the Directive Principles of State Policy and for attainment of the Objectives set out in the Preamble to the Constitution. It became, therefore, necessary to provide expressly that Parliament has the power to amend any provision of the Constitution including the provisions contained in Part III.

491. Article 368 is in a separate Part i. e., Part XX. Its marginal note before the 24th Amendment was "Procedure for amendment of the Constitution". It provided in the substantive portion of the article how the Constitution "shall stand amended" when "An Amendment of this Constitution" was initiated by the introduction of a Bill in either House of Parliament. The following conditions had to be satisfied—

(*i*) The Bill had to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting;

(*ii*) The Bill had to be presented for the assent of the President and his assent had to be obtained.

Under the proviso, it was necessary to obtain ratification of legislatures of not less than one-half of the States by Resolutions before presenting the Bill to the President for assent if the amendment sought to make any change in the Articles, Chapters, etc., mentioned in clauses (*a*) to (*e*). Clause (*e*) was "the provisions of this article".

492. The 24th Amendment made the following changes:

(*i*) The marginal heading has been substituted by "Power of Parliament to amend the Constitution and procedure therefor".

(*ii*) Article 368 has been re-numbered as clause (2).

(*iii*) Before clause (2), the following clause has been inserted:

> "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."

(*iv*) In clause (2) as re-numbered, for the words "it shall be presented to President for his assent and upon such assent being given to the Bill" the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" have been substituted.

(*v*) A new clause (3) has been inserted, namely:

> "(3) Nothing in Article 13 shall apply to any amendment made under this article."

It may be mentioned that by the 24th amendment clause (4) has been inserted in Article 13 itself. It is:

> "(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

---

[50] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

493. On behalf of the petitioners, Mr. Palkhivala stated that he need not for the purposes of this case dispute the 24th Amendment insofar as it leads to the following results:

(i) The insertion of the express provision in Article 368 that the source of the amending power is the Article itself;

(ii) The President is bound to give assent to any Bill duly passed under that article;

The following three results have, however, been the subject of great deal of argument:

(i) The substitution of the words in Article 368 "amend by way of addition, variation of repeal ...." in place of the concept 'amendment';

(ii) Making it explicit in the said article that when Parliament makes a constitutional amendment under the article it acts "in exercise of its constituent power";

(iii) The express provision in Articles 13 and 368 that the bar in the former article against abridging or taking away any of the fundamental rights should not apply to an amendment made under the latter article

493-A. In the judgment of Chief Justice Subba Rao with whom four learned judges agreed in *Golak Nath's case* (supra), the source of the amending power was held to reside in Article 248, read with Entry 97 of List I to the Seventh Schedule. Whether that view is sustainable or not need not be considered here now owing to the concession made by Mr. Palkhivala that by amendment of Article 368 such a power could be validly located in that article even if it be assumed that it did not originally reside there. The real attack, therefore, is directed against the validity of the 24th Amendment in so far as the three results mentioned above are concerned. It has been maintained that if the effect of those results is that the Parliament has clothed itself with legal sovereignty which the People of India alone possess, by taking the full constituent power, and if the Parliament can in exercise of that power alter or destory all or any of the 'essential features' of the Constitution, the 24th Amendment will be void. The fundamental rights embodied in Part III are a part of the 'essential features' and if their essence or core can be damaged or taken away, the 24th Amendment will be void and illegal.

494. The position taken up on behalf of the respondents is that so far as Article 368 is concerned, the 24th Amendment has merely clarified the doubts cast in the majority judgment in Golak Nath. That article, as it originally stood, contained the constituent power by virtue of which all or any of the provisions of the Constitution including the preamble could be added to, varied or repealed. In other words, the power of amendment was unlimited and unfettered and was not circumscribed by any such limitations as have been suggested on behalf of the petitioners. Therefore, the crux of the matter is the determination of the true ambit, scope and width of the amending provisions contained in Article 368 before the changes and alterations made in it by the 24th Amendment. If the article conferred the power of the amplitude now covered by the 24th Amendment nothing new has been done and the amendment cannot be challenged. If, however, the original power though having the constituent quality was a limited one, it could not be increased. In other words the amending body cannot enlarge its own powers.

495. What then is the meaning of the word "amendment" as used in Article 368 of the Constitution. On behalf of the respondents it has been maintained that "amendment of this Constitution" can have only one meaning. No question can arise of resorting to other aids in the matter of interpretation or construction of the expression "amendment". On the other hand, the argument of Mr. Palkhivala revolves on the expression "amendment" which can have more than one meaning and for that reason it is essential to discover its true import as well as ambit by looking at and taking into consideration other permissible aids of construction. No efforts have been spared on both sides to give us all the meanings of the words "amendment" and "amend" from the various dictionaries as also authoritative books and opinions of authors and writers.

496. It is more proper, however, to look for the true meaning of the word "amendment" in the Constitution itself rather than in the dictionaries. Let us first analyse the scheme of Article 368 itself as it stood before the 24th Amendment:

(*i*) The expression "amendment of the Constitution" is not defined or explained in any manner although in other Parts of the Constitution the word "amend", as will be noticed later, has been expanded by use of the expression "amend by way of addition, variation or repeal"

(*ii*) The power in respect of amendment has not been conferred in express terms. It can be spelt out only by necessary implication.

(*iii*) The proviso uses the words "if such amendment seeks to make any change in". It does not use the words "change of" or "change" simpliciter.

(*iv*) The provisions of the Constitution mentioned in the proviso do not show that the basic structure of the Constitution can be changed if the procedure laid down therein is followed. For instance, clause (*a*) in the proviso refers to Articles 54 and 55 which relate to the election of the President. It is noteworthy that Article 52 which provides that there shall be a President of India and Article 53 which vests the power of the Union in the President and provides how it shall be exercised are not included in clause (*a*). It is incomprehensible that the Constitution-makers intended that although the ratification of the Legislatures of the requisite number of States should be obtained if any changes were to be made in Articles 54 and 55 but that no such ratification was necessary if the office of the President was to be abolished and the excutive power of the Union was to be exercised by some other person or authority.

(*v*) Another article which is mentioned in clause (*a*) is Article 73 which deals with the extent of the executive power of the Union. So far as the Vice-President is concerned there is no mention of the relevant articles relating to him. In other words the States have been given no voice in the question whether the office of the Vice-President shall be continued or abolished or what the method of his election would be.

(*vi*) The next article mentioned in clause (*a*) is 162 which deals with the extent of the executive power of the States.

The articles relating to the appointment and conditions of service of a Governor, Constitution and functions of his council of ministers as also the conduct of business are not mentioned in clause (*a*) or any other part of the proviso.

(*vii*) Along with Articles 54, 55, 73 and 162, Article 241 is mentioned in clause (*a*) of the proviso. This article dealt originally only with the High Courts for States in Part C of the First Schedule.

(*viii*) Chapter IV of Part V of the Constitution deals with the Union Judiciary and Chapter V of Part VI with the High Courts in the States. Although these have been included in clause (*b*) of the proviso it is suprising that Chapter VI of Part VI which relates to Subordinate Judiciary is not mentioned at all, which is the immediate concern of the States.

(*ix*) Capter I of Part XI which deals with legislative relations between the Union and the States is included in clause (*b*) of the proviso but Chapter II of that Part which deals with Administrative Relations between the Union and the States and various other matters in which the States would be vitally interested are not included.

(*x*) The provisions in the Constitution relating to services under the State is also with regard to Trade and Commerce are not included in the proviso.

(*xi*) Clause (*c*) of the proviso mentions the lists in the Seventh Schedule. Clause (*d*) relates to the representation of States in Parliament and clause (*e*) to the provisions of Article 368 itself.

497. The net result is that the provisions contained in clauses (*a*) and (*b*) of the proviso do not throw any light on the logic, sequence or systematic arrangement in respect of the inclusion of those articles which deal with the whole of the federal structure. These clauses demonstrate that the reason for including certain articles and excluding others from the proviso was not that all articles dealing with the federal structure or the States had been selected for inclusion in the proviso. The other unusual result is that if the fundamental rights contained in Part III have to be amended that can be done without complying with the provisions of the proviso. It is difficult to understand that the Constitution makers should not have thought of ratification by the States if such important and material rights were to be abrogated or taken away wholly or partially. It is also interesting that in order to meet the difficulty created by the omission of Articles 52 and 53 which relate to there being a President in whom the executive functions of the Union would vest, the learned Solicitor-General sought to *read by implication* the inclusion of those articles because, according to him, the question of election cannot arise with which Articles 54 and 55 are concerned if the office of President is abolished.

498. We may next refer to the use of the words "amendment" or "amended" in other articles of the Constitution. In some articles these words in the context have a wide meaning and in another context they have a narrow meaning. The group of articles which expressly confer power on the Parliament to amend are five including Article 368. The first is Article 4. It relates to laws made under Articles 2 and 3 to provide for amendment of the First and the Second Schedules and supplemental, incidental and consequential matters. The second article is 169 which provides for abolition or creation of Legislative Councils in States. The third and the fourth provisions are Paras 7 and 21 of the 5th and 6th Schedules respectively which have to be read with Article 244 and which deal with the administration of Scheduled Areas and Tribal Areas. The expression used in Articles 4 and 169 is "amendment". In Paras 7 and 21 it is the expanded expression "amend by way of addition, variation or repeal" which has been employed. Parliament has been empowered to make these amendments by law and it has been expressly provided that no such law shall be deemed to be an amendment of the Constitution for the purpose of Article 368.

499. It is apparent that the word "amendment" has been used in a narrower sense in Article 4. The argument that if it be assumed that Parliament is invested with wide powers under Article 4 it may conceivably exercise power to abolish the legislative and the judicial organs of the State altogether was refuted by this Court[51] by saying that a State cannot be formed, admitted or set up by law under Article 4 by the Parliament which does not conform to the democratic pattern envisaged by the Constitution. Similarly any law which contains provisions for amendment of the Constitution for the purpose of abolition or creation of legislative councils in States is only confined to that purpose and the word "amendment" has necessarily been used in a narrow sense. But in Paras 7 and 21 the expanded expression is employed and indeed an attempt was made even in the Constituent Assembly for the insertion of a new clause before clause (1) of draft Article 304 (Present Article 368). The Amendment[52] (No. 3239) was proposed by Mr. H. V. Kamath and it was as follows:

> "Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article."

Mr. Kamath had moved another amendment in draft Article 304 to substitute the words "it shall upon presentation to the President receive his assent". Both these amendments were negatived by the Constituent Assembly.[53] It is noteworthy that the 24th Amendment as now inserted has introduced substantially the same amendments which were not accepted by the Constituent Assembly.

500. The Constituent Assembly must be presumed to be fully aware of the expanded expression, as on September 17, 1949, it had substituted the following section in place of the old Section 291 of the Government of India Act, 1935 by means of Constituent Assembly Act 4 of 1949:

> "291. *Power of the Governor-General to amend certain provisions of the Act and order made thereunder.*—(1) The Governor-General may at any time by Order make such amendments as he considers necessary whether by *way of addition, modification or repeal*, (emphasis supplied) in the provisions of this Act or of any Order made thereunder in relation to any Provincial Legislature with respect to any of the following matters, that is to say,—
>
> (*a*)………………………………………………………………"

---

[51] *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109 at p. 112: AIR 1967 SC 944: (1968) 1 SCJ 240.

[52] *Constituent Assembly Debates*. Vol. 9, p. 1663.

[53] *Ibid.*

The word "amendment" has also been used in certain articles like Article 107 dealing with legislative procedure and Article 111 which enables the President to send a message requesting the Houses to consider the desirability of introducing amendments etc. "Amendment" as used in these articles could only have a limited meaning as is apparent from the context. On behalf of the petitioners a great deal of reliance has been placed on the contrast between the use of the word "amendment" in Articles 4 and 169 and Paras 7 and 21 of the 5th and 6th Schedules which use the composite expression "amend by way of addition, variation or repeal". It is pointed out that in Article 368 it is only the word "amendment" which has been used and if the Constitution-makers intended that it should have the expanded meaning then there was no reason why the same phraseology would not have been employed as in Paras 7 and 21 or as has been inserted now by the 24th Amendment. The steps in this argument are—

(*i*) the contrast in the language employed in the different provisions of the Constitution in respect of amendment;

(*ii*) conferment of the wider power for the purpose of the 5th and 6th Schedules which empower the Parliament to alter and repeal the provisions of those Schedules relating to the institutions contemplated by them, the law-making authority set up under them and the fundamental basis of administration to be found in the two Schedules.

(*iii*) the wide language used in Paras 7 and 21 of the two Schedules was meant for the purpose that at a proper time in the future or whenever considered necessary the entire basic structure of the Schedules could be repealed and the areas and tribes covered by them could be governed and administered like the rest of India;

(*iv*) the use of the word "amendment" simpliciter in Article 368 must have a narrower meaning than the composite expression "amend" or "amendment" by way of addition, variation or repeal and must correspond to the meaning of the word "amend" or "amendment" in Articles 4 and 169.

(*v*) the power of amending the Constitution is not concentrated in Article 368 alone but it is diffused as it is to be found in the other articles and provisions mentioned. The reason why it was added that no law passed by the Parliament under those provisions shall be deemed to be an amendment of this Constitution for the purpose of Article 368 was only meant to clarify that the form and manner prescribed by Article 368 was not to be followed and the Parliament could, in the ordinary way, by following the procedure laid down for passing legislative enactments amend the Constitution to the extent mentioned in those articles and provisions.

501. The learned Advocate-General of Maharashtra, who appears for respondent No. 1, has laid a great deal of emphasis on the fact that Article 368 is the only article which is contained in a separate Part having the title "Amendment of the Constitution". It is under that article that all other provisions including Articles 4, 169 and Paras 7 and 21 of the 5th and 6th Schedules respectively can be amended. The latter group of articles contain a limited power because those Articles are subordinate to Article 368. This is illustrated by the categorical statement contained in each one of those provisions that no such law amending the Constitution shall be deemed to be an amendment thereof for the purpose of Article 368. As regards the composite expression "amend by way of addition, variation or repeal" employed in Paras 7 and 21 of the two Schedules, it has been pointed out that clause (2) in which the words "Amendment of this Constitution" are used clearly shows that addition, variation or repeal of any provision would be covered by the word "amendment". According to the learned Attorney-General the word "amendment" must mean, variation, addition or repeal. He has traced the history behind Paras 7 and 21 of Schedules 5 and 6 to illustrate that the expression "amend by way of addition, variation or repeal" has no such significance and does not enlarge the meaning of the word "amendment". Our attention has been invited to a number of articles in the Constitution itself out of which mention may be made of Articles 320(5) and 392(1) where the expressions used were "such modification, whether by way of repeal or amendment" and "such adoption whether by way of modification, addition or omission". It has been urged that the expression "amendment of this Constitution" has acquired substantive meaning over the years in the context of a written Constitution and it means that any part of the Constitution can be amended by changing the same either by variation, addition or repeal.

502. Dr. B. R. Ambedkar who was not only the Chairman of the Drafting Committee but also the main architect of the Constitution made it clear[54] that the articles of the Constitution were divided into different categories; the first category was the one which consisted of articles which could be amended by the Parliament by a bare majority; the second set of articles were such which required the two-third majority. This obviously had reference to the group of articles consisting of Articles 4, 169 and Paras 7 and 21 of the two Schedules and Article 368 respectively. The scheme of the amending provisions outlined by Dr. B. R. Ambedkar seems to indicate that the Constitution-makers had in mind only one distinction between the amending power conferred by the other articles and Article 368. No such distinction was present to their mind of the nature suggested by the learned Advocate-General that the amending power conferred by articles other than Article 368 was of a purely subordinate nature. In one sense the power contained in the first group of articles can be said to be subordinate in that those articles themselves could be amended by the procedure prescribed by Article 368. But that article itself could be amended by the same procedure. It would, not, therefore, be wrong to say that the amending power was of a diffused kind and was contained in more than one provision of the Constitution. It appears that the statement in the articles and provisions containing the amending power other than Article 368 that any amendment made under those articles would not amount to an amendment under Article 368 merely embodied the distinction emphasised by Dr. B. R. Ambedkar that one category could be amended by the Parliament by a bare majority and all the other articles could be amended by the said body but only by following the form and manner prescribed by Article 368. Although prima facie it would appear that the Constitution-makers did not employ the composite expression in Article 368 for certain reasons and even rejected Mr. Kamath's amendment which pointedly brought to their notice that it was of material importance that the expanded expression should be used, it may not be possible to consider this aspect as conclusive for the purpose of determining the meaning of the word "amendment" in Article 368.

---

[54] *Constituent Assembly Debates*, Vol. 9, p. 1661.

503. According to Mr. Palkhivala there can be three possible meanings of amendment—

(*i*) to improve or better; to remove an error, the question of improvement being considered from the standpoint of the basic philosophy underlying the Constitution but subject to its essential features;

(*ii*) to make changes which may not fall within (*i*) but which do not alter or destroy any of the basic features, essential elements or fundamental principles of the Constitution;

(*iii*) to make any change whatsoever including changes falling outside (*ii*).

He claims that the preferable meaning is that which is contained in (*i*) but what is stated in (*ii*) is also a possible construction. Category (*iii*) should be ruled out altogether. Category (*i*) and (*ii*) have a common factor, namely that the essential features cannot be damaged or destroyed.

504. On behalf of the respondents it is not disputed that the words "amendment of this Constitution" do not mean repeal or abrogation of this Constitution. The amending power, however, is claimed on behalf of the respondents to extend to addition, alteration, substitution, modification, deletion of each and every provision of the Constitution. The argument of the Attorney General is that the amending power in Article 368 as it stood before the 2[illegible] Amendment and as it stands now has always been and continues to be the constituent power, e.g., the power to deconstitute or reconstitute the Constitution or any part of it. Constitution at any point of time cannot be so amended by way of variation, addition or repeal as to leave a vacuum in the government of the country. The whole object and necessity of amending power is to enable the Constitution to continue and such a constituent power, unless it is expressly limited in the Constitution itself, can by its very nature have no limit because if any such limit is assumed, although not expressly found in the Constitution, the whole purpose of an amending power will be nullified. It has been pointed out that in the Constitution First Amendment Act which was enacted soon after the Constitution of India came into force, certain provisions were inserted, others substituted or omitted and all these were described as amendments of the articles mentioned therein. In the context of the Constitution, amendment reaches every provision including the Preamble and there is no ambiguity about it which may justify having resort to either looking at the other articles for determining the ambit of the amendatory power or taking into consideration the Preamble or the scheme of the Constitution or other permissible aids to construction.

505. A good deal of reliance has been placed on behalf of the respondents on Article 5 of the Constitution of the United States, hereinafter called the 'American Constitution' which deals with amendment and its interpretation by the American courts. Reference has been made to the writings of authors and writers who have dealt with the meaning of the word "amendment" in the American Constitution. It has been argued that in Article 5 of that Constitution the word used is "amendments" and our Constitution-makers had that word in mind when they employed the expression "amendment of this Constitution" in Article 368. We propose to refer to the decisions from other countries including those of the Supreme Court of the United States later. We wish to observe, at this stage, that our founding fathers had primarily the Constitutions of Canada, Australia, Eire, U. S. A. and Switzerland in view apart from that of Japan. The whole scheme and language of Article 368 is quite different from the amending provisions in Constitutions of those countries. For instance, in U. S. A., Eire, Australia, Switzerland and Japan the people are associated in some manner or the other directly with the amending process. It would be purely speculative or conjectural to rely on the use of the word "amend" or "amendment" in the Constitution of another country unless the entire scheme of the amending section or article is also kept in mind. In India Parliament is certainly representative of the people but so are similar institutions in the countries mentioned above and yet there is a provision for ratification by convention or referendum or submission of the proposed law to electors directly. Another way of discovering the meaning on which both sides relied on is to refer to the various speeches in the Constituent Assembly by the late Prime Minister Pandit Jawahar Lal Nehru and late Dr. B. R. Ambedkar the Chief Architects of the Constitution. The position which emerges from an examination of their speeches does not lead to any clear and conclusive result. Their speeches show that our Constitution was to be an amendable one and much rigidity was not intended. Pandit Nehru time and again emphasised that while the Constitution was meant to be as solid and as permanent a structure as it could be nevertheless there was no permanence in the constitution and there should be certain flexibility; otherwise it would stop a nation's growth. Dr. Ambedkar, while dealing with draft Article 25 corresponding to the present Article 32, said that the most important article without which the Constitution would be a nullity and which was the very soul of the Constitution and the heart of it was that article. But what he said at a later stage appears to suggest that that article itself could be amended and according to the respondents even abrogated. This illustration shows that nothing conclusive can emerge by referring to the speeches for the purpose of interpretation of the word "amendment".

506. It is not possible to accept the argument on behalf of the respondents that amendment can have only one meaning. This word or expression has several meanings and we shall have to determine its true meaning as used in the context of Article 368 by taking assistance from the other permissible aids to construction. We shall certainly bear in mind the well known principles of interpretation and construction, particularly, of an instrument like a Constitution. A Constitution is not to be construed in any narrow and pedantic sense. A broad and liberal spirit should inspire those whose duty it is to interpret it. *Gwyer, C. J.*,[55] adopted the words of Higgins, J., of the High Court of Australia from the decision in *Attorney-General for New South Wales* v. *The Brewer Employees Union of New South Wales etc.*,[56] according to which even though the words of a Constitution are to be interpreted on the same principles of interpretation as are applied to any ordinary law, these very principles of interpretation require taking into account the nature and scope of the Act remembering that "it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be".[57] The decision must depend on the words of the Constitution as provisions of no two Constitutions are in identical terms. The same learned Chief Justice said that the "grant of the power in general terms standing by itself would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act".[58] The observations of Lord Wright in *James* v. *Commonwealth of Australia*,[59] were also quoted in the aforesaid judgment of the Federal Court of India at page 73:

---

[55] *In re C. P. & Berar Sales of Motor Spirit and Motor Lubricants Taxation Act, 1938*, 1939 FCR 18: AIR 1939 FC 1.

[56] (1908) 6 CLR 469 at pp. 611-612.

[57] 1939 FCR 18, 37 : AIR 1939 FC 1.

> "The question, then, is one of construction and in the ultimate resort must be determined upon the actual words used *read not in a vacuo* but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts."

Apart from the historical background and the scheme of the Constitution the use of the Preamble has always been made and is permissible if the word "amendment" has more than one meaning. Lord Green in *Bidis* v. *General Accident, Fire and Life Assurance Corporation*,[60] pointed out that the words should never be interpreted in vacuo because few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method which he preferred was not to take the particular words and attribute to them a sort of prima facie meaning which have to be displaced or modified. To use his own words "it is to read the statute as a whole and ask oneself the question":

> "In this state, in this context, relating to this subject-matter, what is the true meaning of that word?"

We shall first deal with the Preamble in our Constitution. The Constitution-makers gave to the preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well defined words the key to the understanding of the Constitution.

507. It would be instructive to advert to the various stages through which the Preamble passed before it was ultimately adopted by the Constituent Assembly. In the earlier draft of the Union Constitution the Preamble was a somewhat formal affair. The one drafted by B. N. Rau said:

> "We, the People of India, seeking to promote the common good, do hereby, through our chosen representatives, enact, adopt and give to ourselves this Constitution."

The Union Constitution Committee provisionally accepted the draft Preamble of B. N Rau, and reproduced it in its report of July 4, 1947, without any change with the tacit recognition, at that stage, that the Preamble would finally be based on the Objectives Resolution.

---

[58] *Ibid.*, p. 42.

[59] 1936 AC 578 at p. 613.

[60] (1948) 2 All ER 998.

508. On July 18, 1947, Pandit Nehru in a statement observed that the Preamble was covered more or less by the Objectives Resolution which it was intended to incorporate in the final Constitution. Three days later, while moving the report of the Union Constitution Committee, he suggested that it was not at that stage necessary to consider the Preamble since the Assembly stood by the basic principles laid down in the Objectives Resolution and these could be incorporated in the Preamble later. This suggestion was accepted and further consideration of the Preamble was held over.

509. The Drafting Committee considered the Preamble at a number of its meetings in February, 1948. The Committee omitted that part of the Objectives Resolution which declared that the territories of India would retain the status of automonous units with residuary powers. By this time the opinion had veered round for a strong centre with residuary powers. The Drafting Committee felt that the Preamble should be restricted "to defining the essential features of the new State and its basic socio-political objectives and that the other matters dealt with in the Resolution could be more appropriately provided in the substantial parts of the Constitution". Accordingly it drafted the Preamble, which substantially was in the present form.

510. Meanwhile important developments had taken place in regard to the Indian States. With the completion of the process of merger and integration the Indian States the principle had been accepted: (*i*) of sovereign powers being vested in the people, and (*ii*) that their Constitutions should be framed by the Constituent Assembly and should form integrated part of the new Constitution. On October 12, 1949, Sardar Patel declared in the Assembly that the new Constitution was "not an alliance between democracies and dynasties, but a real union of the Indian people, built on the basic concept of the sovereignty of the people".

511. The draft Preamble was considered by the Assembly on October 17, 1949. The object of putting the Preamble last, the President of Assembly explained, was to see that it was in conformity with the Constitution as accepted. Various amendments were at this stage suggested, but were rejected. One of such was the proposal to insert into it the words "In the name of God". That was rejected on the ground that it was inconsistent with the freedom of faith which was not only promised in the Preamble itself but was also guaranteed as a fundamental right.[61]

512. An amendmet was moved in the Constituent Assembly to make it clear beyond all doubt that sovereignty vested in the people. It was not accepted on the short ground that "the Preamble as drafted could convey no other meaning than that the Constitution emanated from the people and sovereignty to make this Constitution vested in them".[62]

513. The history of the drafting and the ultimate adoption of the Preamble shows—

(1) that it did not "walk before the Constitution" as is said about the preamble to the United States Constitution;

(2) that it was adopted last as a part of the Constitution;

(3) that the principles embodied in it were taken mainly from the Objectives Resolution;

---

[61] *Constituent Assembly Debates*, Vol. 10, pp. 423-442.

[62] *The Framing of India's Constitution* by B. Shiva Rao, p. 131.

(4) the Drafting Committee felt, it should incorporate in it "the essential features of the new State";

(5) that it embodied the fundamental concept of sovereignty being in the people.

514. In order to appreciate how the preamble will assist us in discovering the meaning of the word "amendment" employed in Article 368, we may again notice the argument presented by the respondents that the amending body can alter, vary or repeal any provision of the Constitution and enact it and apply that process to the entire Constitution short of total repeal and abrogation. It is maintained on behalf of the respondents that by virtue of the amending power even the Preamble can be varied, altered or repealed. Mr. Palkhivala, however, relies a great deal on the Preamble for substantiating the contention that "amendment" does not have the widest possible meaning as claimed by the respondents and there are certain limitations to the exercise of the amending power and, therefore, the expression "amendment" should be construed in the light of those limitations. All the elements of the constitutional structure, it is said, are to be found in the Preamble and the amending body cannot repeal or abrogate those essential elements because if any one of them is taken away the edifice as erected must fall.

515. The learned Advocate-General of Maharashtra, says that the preamble itself is ambiguous and it can be of no assistance in that situation. It has further been contended that the concepts recited in the Preamble, e.g., human dignity, social and economic justice are vague: different schools of thought hold different notions of their concepts. We are wholly unable to accede to this contention. The Preamble was finalised after a long discussion and it was adopted last so that it may embody the fundamentals underlying the structure of the Constitution. It is true that on a concept such as social and economic justice there may be different schools of thought but the Constitution-makers knew what they meant by those concepts and it was with a view to implement them that enacted Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy)—both fundamental in character—on the one hand, basic freedoms to the individual and on the other social security, justice and freedom from exploitation by laying down guiding principles for future governments.

516. Our court has consistently looked to the Preamble for guidance and given it a transcedental position while interpreting the Constitution or other laws. It was so referred in *Behram Khurshid Pestkaka's case.*[63] Bhagwati, J., in *Basheshar Nath* v. *Commissioner of Income Tax, Rajasthan,*[64] when considering the question of waiver of a fundamental right referred to the Preamble and to the genesis of declaration of fundamental rights which could be traced to the report of the Nehru Committee of 1928. He proceeded to say "the object sought to be achieved was, as the Preamble to the Constitution states ...." *In re Kerala Education Bill, 1957,*[65] this Court referred tc the Preamble extensively and observed that the fundamental rights were provided for "to implement and fortify the supreme purpose set forth in the Preamble". The court also made use of the "inspiring and nobly expressed Premable to our Constitution" while expressing opinion about the legality of the various provisions of the Kerala Education Bill, 1957. It is unnecessary to multiply citations from judgments of this Court in which the Preamble has been treated almost as sacrosanct and has been relied on or referred to for the purpose of interpreting legislative provisions. In other countries also following the same system of jurisprudence the Preamble has been referred to for finding out the constitutional principles underlying a Constitution. In *Rex* v. *Hess*,[66] it was said:

---

[63] (1955) 1 SCR 613 at p. 653: AIR 1955 SC 123: 1955 SCJ 73: 1955 Cri LJ 215.

[64] 1959 Supp 1 SCR 528: AIR 1959 SC 149: (1959) 35 ITR 190.

[65] 1959 SCR 995: AIR 1958 SC 956: 1959 SCJ 321.

> "I conclude further that the opening paragraph of the Preamble to the B. N. A. Act, 1867, which provided for a 'Constitution similar in principle to that of the United Kingdom' thereby adopted the same constitutional principles and hence Section 1025-A is contrary to the Canadian Constitution and beyond the competence of Parliament or any provincial Legislature to enact so long as our Constitution remains in its present form of a constitutional democracy."

In *John Switzman* v. *Freda Elbling and Attorney General of the Province of Quebec*,[67] Abbot, J., relied on the observations of Duff, C. J., in an earlier decision in *re Alberta Statutes*,[68] which was affirmed in *Attorney-General for Alberta* v. *Attorney-General for Canada*,[69] that view being that the preamble of the British North America Act showed plainly enough that the Constitution of the Dominion was to be similar in principle to that of the United Kingdom. The statute contemplated a Parliament working under the influence of public opinion and public discussion. In *McCawley* v. *The King Lord Birkenhead*,[70] (Lord Chancellor) while examining the contention that the Constitution Act of 1867 (Queensland, Australia) enacted certain fundamental organic provisions of such a nature which rendered the Constitution sterotyped or controlled proceeded to observe at page 711:

> "It may be premised that if a change so remarkable were contemplated one would naturally have expected that the Legislature would have given some indication, in the very lengthy preamble of the Act, of this intention. It has been seen that it is impossible to point to any document or instrument giving to, or imposing upon the Constitution of Queensland this quality before the year 1867. Yet Their Lordships discern nowhere in the preamble the least indication that it is intended for the first time to make provisions which are sacrosanct or which at least can only be modified by methods never previously required."

517. In *re Berubari Union and Exchange of Enclaves*,[71] an argument had been raised that the preamble clearly postulated that the entire territory of India was beyond the reach of Parliament and could not be affected either by ordinary legislation or even by constitutional amendment. The court characterised that argument as extreme and laid down the following propositions:

(1) A Preamble to the Constitution serves as a key to open the minds of the makers, and shows the general purposes for which they made the several provisions in the Constitution;

(2) The preamble is not a part of our Constitution;

(3) It is not a source of the several powers conferred on Government under the provisions of the Constitution;

---

[66] 1949 Bom LR 199 at p. 208.

[67] 1957 Canada LR 285 at p. 326 (SC).

[68] 1938 SCR 100 (Canada).

[69] 1939 AC 11.

[70] 1920 AC 691 at p. 711.

[71] (1960) 3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

(4) Such powers embrace those expressly granted in the body of the Constitution "and such as may be implied from those granted";

(5) What is true about the powers is equally true about the prohibitions and limitations;

(6) The Preamble did not indicate the assumption that the first part of Preamble postulates a very serious limitation on one of the very important attributes of sovereignty, viz., ceding territory as a result of the exercise of the sovereign power of the State of treaty-making and on the result of ceding a part of the territory.

518. On behalf of the respondents reliance has been placed on this case for the proposition that no limitation was read by virtue of the preamble. A careful reading of the judgment shows that what was rejected was the contention that the Preamble was the source of power. Indeed, it was held that the preamble was not even a part of the Constitution and that one must seek power and its scope in the provisions of the Constitution. The premise for the conclusion was that a preamble is not the source of power since it is not a part of the Constitution. The learned Advocate-General of Maharashtra has himself disputed the conclusion in the aforesaid judgment that the preamble is not a part of the Constitution. It is established that it was adopted by the Constituent Assembly after the entire Constitution had been adopted.

519. Mr. Palkhivala has given an ingenious explanation as to why the preamble cannot be regarded as a part of our Constitution. He makes a distinction between the concept of the Constitution and the concept of the Constitution's statutes. The last words in the preamble "This Constitution is the Constitution which follows the preamble," according to Mr. Palkhivala. It starts with Article 1 and ended originally with the Eighth Schedule and now ends with the Ninth Schedule after the First Amendment Act, 1951. It is sought to be concluded from this that the way in which the preamble has been drafted, indicates that what follows or is annexed to the Preamble is the Constitution of India. It is further argued that:

> "The Constitution statute of India consist of two parts—One, the preamble and the other, the Constitution; The preamble is a part of the Constitution statute, but is not a part of the Constitution. It precedes it; The preamble came into force on November 26, 1949 and not January 26, 1950, as contended on behalf of respondent No. 1."

520. There is a clear recital in the preamble that people of India gave to themselves this Constitution on the 26th day of November, 1949. Even if the preamble was actually adopted by the Constituent Assembly at a later date, no one can question the statement made in the Preamble that the Constitution came into force on the date mentioned therein. The preamble itself must be deemed by a legal fiction to have come into force with effect from November 26, 1949. Even if this is a plausible conclusion, it does not appear to be sufficient to support the observation in the *Berubari case* (supra) that the preamble was not a part of the Constitution. To our mind, it hardly makes any substantial difference whether the preamble is a part of the Constitution, or not. The preamble serves several important purposes. Firstly, it indicates the source from which the Constitution comes, viz., the people of India. Next it contains the enacting clause which brings into force the Constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of government and polity which was to be established. From all these, if any provision in the Constitution had to be interpreted and if the expressions used therein were ambiguous, the preamble would certainly furnish valuable guidance in the matter, particularly when the question is of the correct ambit, scope and width of a power intended to be conferred by Article 368.

521. The stand taken up on behalf of the respondents that even the preamble can be varied, altered or repealed, is an extraordinary one. It may be true about ordinary statutes but it cannot possibly be sustained in the light of the historical background, the Objectives Resolution which formed the basis of the preamble and the fundamental position which the preamble occupies in our Constitution. It constitutes a land-mark in India's history and sets out as a matter of historical fact what the people of India resolved to do for moulding their future destiny. It is unthinkable that the Constitution-makers ever conceived of a stage when it would be claimed that even the preamble could be abrogated or wiped out.

522. If the preample contains the fundamentals of our Constitution, it has to be seen whether the word "amendment" in Article 368 should be so construed that by virtue of the amending power the Constitution can be made to suffer a complete loss of identity or the basic elements on which the constitutional structure has been erected, can be eroded or taken away. While dealing with the preamble to the United States Constitution, it was observed by Story (*Commentaries on the Constitution of the United States*, 1833 edition, Volume I), that the preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the Government. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantially to create them.[72]

523. Now let us examine the effect of the declarations made and the statements contained in the preamble on interpretation of the word "amendment" employed in Article 368 of the Constitution. The first thing which the people of India resolved to do was to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expressions are ambiguous in any manner. Their true import and connotation is so well-known that no question of any ambiguity is involved. The question which immediately arises is whether the words "amendment" or "amended" as employed in Article 368 can be so interpreted as to confer a power on the amending body to take away any of these three fundamental and basic characteristics of our polity. Can it be said or even suggested that the amending body can make institutions created by our Constitution undemocratic as opposed to democracy; or abolish the office of the President and, instead, have some other head of the State who would not fit into the conception of a 'Republic'. The width of the power claimed on behalf of the respondents has such a large dimension that even the above part of the preamble can be wiped out from which it would follow that India can cease to be a Sovereign Democratic Republic and can have a polity denuded of sovereignty, democracy and Republican character.

524-25. No one has suggested—it would be almost unthinkable for anyone to suggest—that the amending body acting under Article 368 in our country will ever do any of the things mentioned above, namely change the Constitution in such a way that it ceases to be a Sovereign Democratic Republic. But while examining the width of the power, it is essential to see its limits, the maximum and the minimum; the entire ambit and magnitude of it and it is for that purpose alone that this aspect is being examined. While analysing the scope and width of the power claimed by virtue of a constitutional provision, it is wholly immaterial whether there is a likelihood or not of such an eventuality arising.

---

[72] Story, Para 462 at p. 445.

526. Mr. Palkhivala cited example of one country after another in recent history where from a democratic Constitution the amending power was so utilized as to make that country wholly undemocratic resulting in the negation of democracy by establishment of rule by one party or a small oligarchy. We are not the least impressed by these instances and illustrations. In the matter of deciding the questions which are before us, we do not want to be drawn into the political arena which, we venture to think, is "out of bounds" for the judiciary and which tradition has been consistently followed by this Court. (*See* Wanchoo, J., as he then was in *Golak Nath case.*[73])

527. Since the respondents themselves claim powers of such wide magnitude that the results which have been briefly mentioned can flow apart from others which we shall presently notice, the consequences and effect of suggested construction have to be taken into account as has been frequently done by this Court. Where two constructions are possible the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory.[74]

528. In *Don John Francis Douglas Liyange and Others* v *The Queen,*[75] Lord Pearson declined to read the words of Section 29(1) of the Ceylon Constitution as entitling the Parliament to pass legislation which usurped the judicial power of the judicature by passing an Act of Attainder against some persons or instructing a judge to bring in a verdict of guilty against someone who is being tried—if in law such usurpation would otherwise be contrary to the Constitution.

529. In Maxwell's *Interpretation of Statutes,* (12th Edition), Chapter 5 deals with restrictive construction and the very first section contains discussion on the question whether the consequences of a particular construction being adopted can be considered and examples have been given from cases decided in England with reference to the consequences. According to *American Jurisprudence,* Vol. 50, 1962 Reprint at pp. 372, 373 there are cases in which consequences of a particular construction are in and of themselves, conclusive as to the correct solution of the question.

530. The learned Advocate-General of Maharashtra has contended that the proper way of construing an amending provision is not to take into consideration any such speculation that the powers conferred by it, would be abused. It has also been said that any court deciding the validity of a law cannot take into consideration extreme hypothetical examples or assume that a responsible Legislature would make extravagant use of the power [76]

---

[73] (1967) 2 SCR 762 at p. 850: AIR 1967 SC 1643: (1967) 2 SCJ 486.

[74a] *State of Punjab* v *Ajaib Singh,* 1953 SCR 254 at p. 264: AIR 1953 SC 10: 1952 SCJ 664: 1953 Cri LJ 180.

[74b] *Collector of Customs, Baroda* v. *Dig-Vijay Singhji Spinning & Weaving Mills Ltd.,* (1962) 1 SCR p. 896: AIR 1961 SC 1549: (1963) 1 SCJ 278: (1961) 2 Cri LJ 720.

[75] (1967) 1 AC 259.

531. According to Mr. Palkhivala, the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best and what is the worst It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents.

532. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the Parliament or the Legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. According to the learned Attorney-General, the declaration in the preamble to our Constitution about the resolve of the people of India to constitute it into a Sovereign Democratic Republic is only a declaration of an intention which was made in 1947 and it is open to the amending body now under Article 368 to change the Sovereign Democratics Republic into some other kind of polity. This by itself shows the consequence of accepting the construction sought to be put on the material words in that article for finding out the ambit and width of the power conferred by it.

533. The other part of the Preamble may next be examined. The Sovereign Democratic Republic has been constituted to secure to all the citizens the objectives set out. The attainment of those objectives forms the fabric of and permeates the whole scheme of the Constitution. While most cherished freedoms and rights have been guaranteed the Government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised—then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted. The three main organs of Government, legislative, executive and judiciary and the entire mechanics of their functioning were fashioned in the light of the objectives in the Preamble, the nature of polity mentioned therein and the grand vision of a united and free India in which every individual high or low will partake of all that is capable of achivement. He must, therefore, advert to the background in which Parts III and IV came to be enacted as they essentially form a basic element of the Constitution whithout which its identity will completely change.

534. It is not possible to go back at any length to the great struggle for freedom from British Rule and the attainment of independence. The British executive's arbitrary acts, internments and deportations without trial and curbs on the liberty of the press and individuals are too well known to every student of Indian history to be specifically mentioned. This was before some essential rights based on British Common Law and jurisprudence came to be embodied in various parliamentary enactments. According to B. N. Rau,[77] human rights, with few exceptions, were not guaranteed by the Constitution (Government of India Act). Shiva Rao has in his valuable study[78] given the various stages beginning with 1895 Constitution of India Bill framed by the Indian National Congress which envisaged a Constitution guaranteeing a number of freedoms and rights. Two events at a later stage exercised a decisive influence on the Indian leaders. One was the inclusion of a list of fundamental rights in the Constitution of Irish Free State in 1921 and the other, the problem of minorities.[79]

---

[76] *The Bank of Toronto* v. *Lambe*, (1887) 12 AC 575 at pp. 586-587.

535. The next steps were the report of the Nehru Committee in 1928, the reiteration of the resolve at the session of the Indian National Congress at its Karachi Session in March, 1931 and omitting some details, the deliberations of the Sapru Committee appointed by the All India Parties Conference (1944-45). The British Cabinet Mission in 1946 recommended the setting up of an Advisory Committee for reporting inter alia on fundamental rights. Before reference is made to the Objectives Resolution adopted on January 22, 1947 it must be borne in mind that the post war period in Europe had witnessed a fundamental orientation in juristic thinking, particularly in West Germany, characterised by a farewell to positivism, under the influence of positivist legal thinking. During the pre-war period most of the German Constitutions did not provide for judicial review which was conspicuously absent from the Weimar Constitution even though Hugo Preuss, often called the Father of that Constitution, insisted on its inclusion. After World War II when the disastrous effects of the positivist doctrines came to be realized there was a reaction in favour of making certain norms immume from amendment or abrogation. This was done in the Constitution of the Federal Republic of Germany. The atrocities committed during Second World War and the world-wide agitation for human rights ultimately embodied in the U. N. Declaration of Human Rights on which a number of provisions in Parts III and IV of our Constitution are fashioned must not be forgotten while considering these matters. Even in Great Britain, where the doctrine of the legal sovereignty of Parliament has prevailed since the days of Erskine, Blackstone, Austin, and lastly Dicey, the new trend in judicial decisions is to hold that there can be at least procedural limitations (requirement of form and manner) on the legislative powers of the Legislature.[80] The Objective's Resolution declared, inter alia, the firm and the solemn resolve to proclaim India as Independent Sovereign Republic and to draw up for her future governance a Constitution. Residuary powers were to vest in the States. All power and authority of the Sovereign Independent India, its constituent parts and organs of Government, were derived from the people and it was stated :

> "(5) wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief,

---

[77] *Year Book of Human Rights, 1947.*
[78] *Framing of India's Constitution*, (B. Shiva Rao).
[79] *Ibid.* p. 172.
[80] This follows from the decisions in *Moore* v. *The Attorney-General for the Irish Free State*, 1935 AC 484 and *Attorney-General for New South Wales* v. *Trethowan*, 1932 AC 526.

faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations, and".

535-A. It may be recalled that as regards the minorities the Cabinet Mission had recognised in their report to the British Cabinet on May 6, 1946, only three main communities: general, Muslims and Sikhs. General community included all those who were non-Muslims or non-Sikhs. The Mission had recommended an Advisory Committee to be set up by the Constituent Assembly which was to frame the rights of citizens, minorities, tribals and excluded areas. The Cabinet Mission statement had actually provided for the cession of sovereignty to the Indian people subject only to two matters which were: (1) willingness to conclude a treaty with His Majesty's Government to cover matters arising out of transfer of power and (2) adequate provisions for the protection of the minorities. Pursuant to the above and Paras 5 and 6 of the Objectives Resolution the Constituent Assembly set up an Advisory Committee on January 24, 1947. The Committee was to consist of representatives of muslims, the depressed classes or the scheduled castes, the Sikhs, Christians, Parsis, Anglo-Indians, tribals and excluded areas besides the Hindus.[81] As a historical fact it is safe to say that at a meeting held on May 11, 1949, a resolution for the abolition of all reservations for minorities other than the scheduled castes found wholehearted support from an overwhelming majority of the members of the Advisory Committee. So far as the scheduled castes were concerned it was felt that their peculiar position would necessitate special reservation for them for a period of ten years. It would not be wrong to say that the separate representation of minorities which had been the feature of the previous Constitutions and which had witnessed so much of communal tension and strife was given up in favour of joint electorates in consideration of the guarantee of fundamental rights and minorities' rights which it was decided to incorporate into the new Constitution. The Objectives Resolution can be taken into account as a historical fact which moulded its nature and character. Since the language of the Preamble was taken from the resolution itself the declaration in the Preamble that India would be a Sovereign Democratic Republic which would secure to all its citizens justice, liberty and equality was implemented in Parts III and IV and other provisions of the Constitution. These formed not only the essential features of the Constitution but also the fundamental conditions upon and the basis on which the various groups and interests adopted the Constitution as the Preamble hoped to create one unified intergrated community. The decision of the Privy Council in *The Bribery Commissioner* v. *Pedrick Ranasinghe*,[82] will require a more detailed discussion in view of the elaborate arguments addressed on both sides based on it. But for the present all that need by pointed out is that the above language is borrowed mainly from the judgment of Lord Pearce who, after setting out Section 29 of the Ceylon Constitutional Order which gave Parliament the power to make laws for the peace, order and good government of the island, said with regard to clause (2) according to which no law could prohibit or restrict the free exercise of any religion:

---

[81] *Constituent Assembly Debates*, Vol. 2, pages 330-349.

[82] 1965 AC 172 at pp. 193-194.

> "There follow (*b*), (*c*) and (*d*), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution."

Another apposite observation in this connection was made in *In re the Regulation and Control of Aeronautics in Canada*,[83] while interpreting the British North America Act, 1867. It was said that inasmuch as the Act embodied a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation and the foundation upon which the whole structure was subsequently erected.

536. Our Constitution is federal in character and not unitary. In a federal structure the existence of both the Union and the States is indispensable and so is the power of judicial review. According to Dicey[84]:

> "A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant by which it is created. Hence every power, executive, legislative or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the Constitution."[84]

The object for which a federal State is formed involves a division of authority between the national government and the separate States.[85] Federalism can flourish only among communities imbued with a legal spirit and trained to reverence the law. Swiss federalism, according to Dicey, "fails, just where one would expect it to fail, in maintaining that complete authority of the courts which is necessary to the perfect federal system".[86] The learned Advocate-General of Maharashtra while relying a great deal on Dicey's well known work in support of his other points, has submitted that although he was one of the greatest writers on the law of English Constitution, his book was concerned with two or three guiding principles which pervade the modern Constitution of England. The discussion of Federal government in his book was a subordinate part and the discussion was designed to bring out sharply the two or three guiding principles of the English Constitution by contrast with the different principles underlying the Constitution of the federal government. Reliance has been placed on Professor Wheare's statement in his book,[87] that the Swiss courts are required by the Constitution to treat all laws passed by the federal assembly as valid though they may declare Cantonal laws to be void and that does not constitute such a departure from the federal principle that the Swiss people cannot be regarded as having a federal Constitution and a federal government. Switzerland is probably the only country having a federal Constitution where full-fleged right of judicial review is not provided. We are unable to understand how that can have any relevancy in the presence of judicial review having been made an integral part of our Constitution.

537. It is pointed out on behalf of the petitioners that the scheme of Article 368 itself contains intrinsic pieces of evidence to give a limited meaning to the word "amendment". Firstly, Article 368 refers to "an amendment of this Constitution", and the result of the amendment is to be that "the Constitution shall stand amended". As the Constitution has an identity of its own, an amendment, made under a power howsoever widely worded cannot be such as would render the Constitution to lose its character and nature. In other words, an amendment cannot be such as would denude the Constitution of its identity. The amending power is conferred on the two Houses of Parliament, whose identity is clearly established by the provisions in the Constitution. It must be the Parliament of the Sovereign Democratic Republic. It is not any Parliament which has the amending power, but only that Parliament which has been created by the Constitution. In other words, it must continue to be the Parliament of a sovereign and democratic republic. The institution of States must continue to exist in order that they may continue to be associated with the amending power in the cases falling under the proviso. If the respondents are right, the proviso can be completely deleted since Article 368 itself can be amended. This would be wholly contrary to the scheme of Article 368 because two agencies are provided for amending the provisions covered by the proviso. One agency cannot destroy the other by the very exercise of the amending power. The effect of limitless amending power in relation to amendment of Article 368 cannot be condusive to the survival of the Constitution because the amending power can itself be taken away and the Constitution can be made literally unamendable or virtually unamendable by providing for an impossible majority.

---

[83] 1932 AC 54 at p. 70.

[84] *Law of the Constitution* by A. V. Dicey p. 144.

[85] *Ibid.* p. 151.

[86] *Ibid.* p. 180.

[87] *Federal Government*, 4th Edn., 1963.

538. While examining the above contentions, it is necessary to consider the claim of the respondents that the amending body under Article 368 has the full constituent power. It has been suggested that on every occasion the procedure is followed as laid down in Article 368 by the two Houses of Parliament and the assent of the President is given there is the reproduction of the functions of a Constituent Assembly. In other words, the Parliament acts in the same capacity as a Constituent Assembly when exercising the power of amendment under the said article. This argument does not take stock of the admission made on behalf of the respondents that the entire Constitution cannot be repealed or abrogated by the amending body. Indisputably, a Constituent Assembly specially convened for the purpose would have the power to completely revise, repeal or abrogate the Constitution. This shows that the amending body under Article 368 cannot have the same powers as a Constituent Assembly. Even assuming that there is a reference on the nature of power between enacting a law and making an amendment, both the powers are derived from the Constitution. The amending body has been created by the Constitution itself. It can only exercise those powers with which it has been invested. And if that power has limits, it can be exercised only within those limits.

539. The respondents have taken up the position that even if the power was limited to some extent under Article 368, as it originally stood, that power could be enlarged by virtue of clause (*e*) of the proviso. It must be noted that the power of amendment lies in the first part of Article 368. What clause (*e*) in the proviso does, is to provide that if Article 368 is amended, such an amendment requires ratification by the States, besides the larger majority provided in the main part. . If the amending power under Article 368 has certain limits and is not unlimited, Article 368 cannot be so amended as to remove these limits nor can it be amended so as to take away the voice of the States in the amending process. If the Constitution-makers were inclined to confer the full power of a Constituent Assembly,

SCC Online

it could have been easily provided in suitable terms. If, however, the original power was limited to some extent, it could not be enlarged by the body possessing the limited power. That being so, even where an amending power is expressed in wide terms, it has to be exercised within the framework of the Constitution. It cannot abrogate the Constitution or frame a new Constitution or alter or change the essential elements of the constitutional structure. It cannot be overlooked that the basic theory of our Constitution is that "Pouvoir Constituent", is vested in the people and was exercised, for and on their behalf of the Constituent Assembly for the purpose of framing the Constitution.

540. To say, as has been said on behalf of the respondents, that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment is an over-simplification. In certain Constitutions there can be procedural and/or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the ratification of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the Houses of the concerned Legislature sitting jointly or separately or by way of a convention, referendum, etc. Besides these limitations, there can be limitations in the content and scope of the power. To illustrate, although the power to amend under Article 5 of the U. S. Constitution resides ultimately in the people, it can be exercised in either of the modes as might be prescribed by the Congress, viz., through ratification by the State Legislatures or through conventions, specially convened for the purpose. The equal suffrages in the Senate granted to each of the States, cannot be altered without the consent of the State. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the Legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly, no question of the law-making body being a sovereign body, for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people. This is especially so where the Constitution contains a Bill of Rights, for such a Bill imposes restraints on that body, i. e. it negates the equation of that body with the people.

541. Before concluding the topic on the interpretation or construction of the words "amendment of this Constitution" in Article 368, it is necessary to deal with some American decisions relating to Article 5 of the American Constitution on which a great deal of reliance was placed on behalf of the respondents for establishing that the word "amendment" has a precise and definite meaning which is of the widest amplitude. The first relates to the 18th Amendment, known as the National Prohibition cases in the *State of Rhode Island* v. *A. Mitchell Palmer*.[88] In that case and other cases heard with it, elaborate arguments were addressed involving the validity of the 18th Amendment and of certain features of the National Prohibition Law, known as Volstead Act, which was adopted to enforce the amendment. The relief sought in each case was an injunction against the execution of that Act. The Court merely stated its conclusions and did not give any reasons—

---

[88] 64 L Ed 946.

a matter which was profoundly regretted by Chief Justice White. From the conclusions stated and the opinion of the Chief Justice it appears that a good deal of controversy centered on Section 2 of the amendment which read "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation". In the dissenting opinion of Mr. Justice Mckenna it was said that the constitutional validity of the 18th Amendment had also been attacked and although he dissented in certain other matters he agreed that the 18th Amendment was a part of the Constitution of the United States. The learned Advocate-General of Maharashtra has placed a great deal of reliance on this decision. His argument is that though the judgment in the *Rhode Island case* (supra) gives no reasons, yet it is permissible to look at the elaborate briefs filed by the counsel in several cases and their oral arguments in order to understand what was argued and what was decided. One of the main contentions raised was that the 18th Amendment was not in fact an amendment, for an amendment is an alteration or improvement of that which is already there in the Constitution and that term is not intended to include any addition of a new grant of power. The judgment shows that this argument was not regarded even worth consideration and was rejected outright. Now it is significant that most of the justices including the Chief Justice who delivered judgments dealt only with the questions which had nothing to do with the meaning of the word "amendment". It is not possible to derive much assistance from this judgment.

542. In *J. J. Dhillon* v. *R. W. Gloss*,[89] it was observed that an examination of Article 5 discloses that it was intended to invest Congress with a wide range of power in proposing amendments. However, the following observations are noteworthy and have been relied upon in support of the case of the petitioners that according to the United States Constitution it is the people who get involved in the matter of amendments. "A further mode of proposal —as yet never invoked—is provided, which is, that on application of two-thirds of the States, Congress shall call a convention for the purpose. When proposed in either mode, amendments, to be effective must be ratified by the Legislatures or by convention in three-fourths of the States as the one or the other mode of ratification may be proposed by the Congress". Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition for amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is: (*a*) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (*b*) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

543. Although all the amendments were made by the method of ratification by the requisite number of State Legislatures, the convention mode was adopted when the 18th Amendment was repealed by the 21st Amendment. Another case, *United States of America* v. *William H. Sprague and William, J. Howey*,[90] will be discussed more fully while considering the question of implied limitations. All that it establishes for the purpose of meaning of amendment is that one must look to the plain language of the article conferring the power of amendment and not travel outside it. Article 5, it was said, contained procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State might be deprived of equal representation in the Senate without its consent. Mr. Justice Douglas while delivering the opinion of the court in *Howard Joseph Whitehill* v. *Wilson Elkins*,[91] stated in categorical terms that the Constitution prescribes the method of "alteration" by amending process in Article 5 and, while the procedure for amending it is restricted there is no restraint on the kind of amendment that may be offered. Thus the main submission on behalf of the counsel for the respondents has been that Article 5 of the United States Constitution served as a model for Article 368 of our Constitution.

---

[89] 65 L Ed 994.

[90] 75 L Ed 640, 644.

544. Article 5 provides different modes of amendment. These may be analysed as follows:

The proposals can be made,—

(1) By two-thirds of both Houses of the Congress, or

(2) By a Convention for proposing amendments to be called by the Congress on the application of Legislatures of two-thirds of the States.

The ratification of the proposals has to be made by—

(1) Legislatures of three-fourths of the States; or

(2) by Conventions in three-fourths thereof (as one or the other mode of ratification may be proposed by the Congress).

In *Hawke* v. *Smith*,[92] the question raised was whether there was any conflict between Article 5 of the U. S. Constitution which gave power to the Congress to provide whether the ratification should be by State Legislatures or Conventions and the Constitution of Ohio as amended. The Supreme Court held that Article 5 was grant of authority by the people to Congress. The determination of the method of ratification was the exercise of the national power specifically granted by the Constitution and that power was limited to two methods, by the State Legislatures or by Conventions. The method of ratification, however, was left to the choice of Congress. The language of the article was plain and admitted of no doubt in its interpretation. In that case the Constitution of Ohio even after amendment which provided for referendum vested the legislative power primarily in a General Assembly consisting of a Senate and a House of Representatives. Though the law-making power of a State was derived from the people the power to ratify a proposed amendment to the Federal Constitution had its source in that Constitution. The act of ratification by the State derived its authority from the federal Constitution. Therefore, in order to find out the authority which had the power to ratify, it was Article 5, to which one had to turn and not to the State Constitution. The choice of means of ratification was wisely withheld from conflicting action in the several States.

545. On behalf of the respondents it is claimed that these decisions establish that the power of amendment conferred by Article 5 was of the widest amplitude, it could be exercised through the representatives of the people, both in the Congress and the State Legislatures. In the case of Article 368 also Parliament consists of representatives of the people and the same analogy can be applied that it is a grant of authority by the people to the Parliament. This argument loses sight of the fact that under the American theory of government, power is inherent in the people including the right to alter and amend the organic instrument of government. Indeed, practically all the State Constitutions associate the people with the amending process. The whole basis of the decisions of the Supreme Court of the United States and of some of the State Supreme Courts is that it is the people who amend the Constitution and it is within their power to make the federal Constitution or unmake it. The reason is quite obvious. So far as Article 5 of the American Constitution is concerned, out of the alternative methods provided for amendment, there is only one in which the people cannot get directly associated, whereas in the others they are associated with the amending process, e. g., proposal of amendment by two-thirds of both Houses of Congress and its ratification by conventions in three-fourths of the States or a proposal of amendment by a convention called on the application of two-thirds of the State Legislatures and its ratification by either convention in three-fourths of the States or by the Legislature of the same number of States.

---

[91] 19 L Ed 2nd 228.

[92] 64 L Ed 871.

546. The meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution. Even the concession of the learned Attorney-General and the Advocate-General of Maharashtra that the whole Constitution cannot be abrogated or repealed and a new one substituted supports the conclusion that the widest possible meaning cannot be given to it

547. Coming to the question of what has been called "inherent and implied limitations" to the amending power in Article 368 of our Constitution, Mr. Palkhivala has maintained that inherent limitations are those which inherent in any authority from its very nature, character and composition whereas implied limitations are those which are not expressed but are implicit in the scheme of the Constitution conferring the power. He maintains that the "rule is established beyond cavil that in construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed".[93] Although the courts have rejected in various cases a plea that a particular inherent or implied limitation should be put upon some specific constitutional power, no court, says Mr. Palkhivala, has ever rejected the principle that such limitations which are fairly and properly deducible from the scheme of the Constitution should be read as restrictions upon a power expressed in general terms. Several decisions of our court, of the Privy Council, Irish courts, Canadian and Australian courts have been cited in support of the contention advanced by him. The approach to this question has essentially to be to look at our own decisions first. They fall in two categories. In one category are those cases where limitations have been spelt out of constitutional provisions; the second category consists of such decisions as have laid down that there is an implied limitation on legislative power.

548. Taking up the cases of the first category, before 1955, Article 13(2) was read as containing an implied limitation that the State could acquire property only for a public purpose. (The Fourth Amendment expressly enacted this limitation in 1955). It was observed in *Chiranjit Lal*

---

[93] *American Jurisprudence*, (2d), Vol. 16. p. 251.

Chowdhury v. *The Union of India & Others*,[94] that one limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for a public purpose. Mahajan, J., (later Chief Justice) said in the *State of Bihar* v. *Maharajaadhiraja Sir Kameshwar Singh of Darbhanga & Others*,[95] that the existence of a public purpose is undoubtedly an implied condition of the exercise of compulsory power of acquisition by the State. The power conferred by Articles 3 and 4 of the Constitution to form a new State and amend the Constitution for that purpose has been stated to contain the implied limitation that the new State must conform to the democratic pattern envisaged by the Constitution and the power which Parliament can exercise is not the power to override the constitutional scheme.[96] It may be mentioned that so far as Article 368 is concerned there seems to have been a good deal of debate in *Golak Nath's case* (supra) on the question whether there were any inherent or implied limitations. Dealing with the argument that in exercise of the power of amendment Parliament could not destroy the structure of the Constitution but it could only modify the provisions thereof within the framework of its original instrument for its better effectuation, Subba Rao, C. J., observed that there was no necessity to express any opinion on this all important question owing to the view which was being taken with regard to the meaning of the word "law" in Article 13(2). But it was recognised that the argument had considerable force. Wanchoo, J., (as he then was) considered the question of implied limitations at some length but felt that if any implied limitation that basic features of the Constitution cannot be changed or altered, were to be put on the power of amendment, the result would be that every amendment made in the Constitution would involve legal wrangle. On the clear words of Article 368 it was not possible to infer any implied limitation on the power of amendment. Hidayatullah, J., (later Chief Justice) discussed the question of implied limitations and referred to the spate of writings on the subject. He expressed no opinion the matter because he felt that in our Constitution Article 13(2) took in even constitutional amendments. Bachawat, J., disposed of the matter by saying that the argument overlooked the dynamic character of the Constitution. Ramaswami, J., clearly negatived the argument based on implied limitations on the ground that if the amending power is an adjunct of sovereignty it does not admit of any limitation.

549. The cases which fall in the second category are decidedly numerous. It has been consistently laid down that there is an implied limitation on the legislative power; the Legislature cannot delegate the essentials of the legislative function. Mukherjea, J., (who later became Chief Justice) in *Re Delhi Law Act, 1912 case*[97] stated in clear language that the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete. The same implied limitation on the Legislature, in the field of delegation, has been invoked in *Raj Narain Singh* v. *Patna Administration*;[98]; *Hari Shankar Bagla* v. *State of Madhya Pradesh*[99]; *Vasantlal*

---

[94] 1950 SCR 869 at p. 902: AIR 1951 SC 41: 1951 SCJ 29.

[95] 1952 SCR 889 at p. 934: AIR 1952 SC 252: 1952 SCJ 354.

[96] *Mangal Singh* v. *Union of India*, (1967) 2 SCR 109 at p. 112: AIR 1967 SC 944: (1968) 1 SCJ 240.

[97] 1951 SCR 747 at pp. 984-985: AIR 1951 SC 332: 1951 SCJ 527.

[98] (1955) 1 SCR 290: AIR 1954 SC 569: 1954 SCJ 661.

[99] (1955) 1 SCR 380: AIR 1954 SC 465: 1954 SCJ 637.

Sanjanwala v. *State of Bombay*[1]; *The Municipal Corporation of Delhi* v. *Birla Cotton Mills*[2] and *D. S. Grewal* v. *State of Punjab*[3] implied limitations have also been placed upon the Legislature which invalidates legislation usurping the judicial power: See for instance *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality & Others*[4] and *Municipal Corporation of the City of Ahmedabad, etc.* v. *New Shorock Spg. & Wvg. Co. Ltd. etc.*[5]

550. Before we go to cases decided by the courts in other countries it may be useful to refer to some of the constitutional provisions which are illustrative of the concept of implications that can be raised from the language and context thereof. The first provision in point is Article 368 itself. It has been seen at the stage of previous discussion that the power to amend is to be found in that article only by implication as there is no express conferment of that power therein. The learned Solicitor-General made a concession that various articles are included by implication in the clauses of the proviso by reason of the necessity for giving effect to the express power contained therein, e. g., Articles 52 and 53 must be so read as to impliedly include the power to amend Articles 54 and 55 which are not expressly mentioned in clause (*a*) of the proviso. It has been implied that the President has been made a formal or a constitutional head of the executive and the real executive power vests in the council of ministers and the Cabinet.[6] Article 53 declares that the executive power of the Union shall be vested in the President; Article 74 provides for a council of ministers headed by the Prime Minister to aid and advise the President in exercise of his functions. Article 75 says that the Prime Minister shall be appointed by the President and the other ministers shall be appointed by him on the advice of the Prime Minister. The ministers shall hold office during the pleasure of the President and the council of ministers shall be collectively responsible to the House of the people. Although the executive power of the President is apparently expressed in unlimited terms, an implied limitation has been placed on his power on the ground that he is a formal or constitutional head of the executive and that the real executive power vests in the council of minister. This conclusion which is based on the implications of the Cabinet System of Government can be said to constitute an implied limitation on the power of the President and the Governors.

551. It may be mentioned in all fairness to the Advocate-General of Maharashtra that the Court did not desire him to address in detail about the President or the Governor being a constitutional head and the implications arising from the system of Cabinet Government. The decisions thereon are being referred to for the purpose of noticing that according to them the President or the Governor though vested with full executive powers cannot exercise them personally and it is only the council of ministers which exercises all the executive functions. This is so, notwithstanding the absence of any express provisions in the Constitution to that effect.

552. Next, reference may be made to the decisions of the Privy Council relied on by one side or the other for deciding the question under consideration. The Advocate-General of Maharashtra laid much stress on the principle enunciated in *Queen* v. *Burah*[7] which according to him, has been consistently followed by the Federal Court and this Court. The principle is that when a question arises whether the prescribed limits have been exceeded the court must look to the terms of the instrument "by which affirmatively, the legislative powers were created and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ....it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions". The ratio of that decision is that conditional legislation is to be distinguished from delegation of legislative power and that conditional legislation is within the power of the Legislature in the sense of any express words prohibiting conditional legislation. The oft-quoted words about the affirmative conferment of power and absence of express restriction on the power are used only to repel the contention that conditional legislation was barred by implication. It is significant that if *Queen* v. *Burah* (supra) is to be treated as laying down the principle that the powers in a Constitution must be conferred only in affirmative words the argument of the respondents itself will suffer from the infirmity that it is only by necessary implication from the language of Article 368 (before the 24th Amendment) that the source of the amending power can be said to reside in that article. There were no such words in express or affirmative terms which conferred such a power. Indeed in *Golak Nath's case*[8] there was a sharp divergence of opinion on this point. Subba Rao, C. J., with whom four other judges agreed held that the source of the amending power was to be found in the provisions conferring residuary provisions, namely, Article 248 read with Entry 97 in the Seventh Schedule. The other six judges including Hidayatullah, J., were of the view that the power was to be found in Article 368 itself.

---

[1] (1961) 1 SCR 341: AIR 1961 SC 4: (1961) 1 SCJ 395.

[2] (1968) 3 SCR 251: AIR 1968 SC 1232: (1969) 1 SCJ 621.

[3] 1959 Supp 1 SCR 792: AIR 1959 SC 512: 1959 SCJ 399.

[4] (1970) 1 SCR 388 at pp. 392-393: (1969) 2 SCC 283, 287.

[5] (1971) 1 SCR 288 at pp. 294-297: (1970) 2 SCC 280, 285-87.

[6] *Ram Jawaya Kapur* v. *The State of Punjab*, (1955) 2 SCR 225: AIR 1955 SC 549: 1955 SCJ 504.

[7] (1878) 3 AC 889 at pp. 904-905.

553. In *The Initiative and Referendum Act*[9] the position briefly was that the British North America Act, 1867, Section 92, head 1, which empowered a Provincial Legislature to amend the Constitution of the Province, "excepting as regards the office of the Lieutenant-Governor", excluded the making of a law which abrogated any power which the Crown possessed through the Lieutenant-Governor who directly represented the Crown. The Legislative Assembly of Manitoba passed the Initiative and Referendum Act. It compelled the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the Legislature of which he was the constitutional head. The Privy Council was of the opinion that under the provisions of that law the Lieutenant-Governor was rendered powerless to prevent a proposed law when passed in accordance with the Act from becoming actual law. The language of the Act could not be construed otherwise than as intended, seriously affecting the position of the Lieutenant-Governor as an integral part of the Legislature and to detract from the rights which were important in the legal theory of that position. Section 92 of the Act of 1867 entrused the legislative power in a Province to its Legislature and that Legislature only. A body that has power of legislation on the subjects entrusted to it, the power being so ample as that enjoyed by a Provincial Legislature in Canada, could while "preserving its own capacity intact seek the assistance of a subordinate agency....................but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes (*sic*) own existence".[10]

---

[8] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

[9] 1919 AC 935.

[10] *Ibid.* at p. 945.

554. This case is more in point for consideration of validity of that part of the 25th Amendment which inserted Article 31-C but it illustrates that an implied limitation was spelt out from the constitutional provisions of the British North America Act, 1867 which conferred legislative powers on the Legislatures of provinces as constituted by that Act.

555. *McCawlay* v. *The King*[11] was another case involving constitutional questions. The Legislature of Queensland (Australia) had power to include in an Act a provision not within the express restrictions contained in the Order in Council of 1959. But inconsistent with the term of the Constitution of Queensland, without first amending the term in question under the powers of amendments given to it, the Industrial Arbitration Act of 1916 contained provisions authorising the Government in Council to appoint any Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court of Queensland. After explaining the distinction between a controlled and an uncontrolled Constitution, Their Lordships proceeded to examine the contention that the Constitution of Queensland could not be altered merely by enacting legislation inconsistent with its article; it could only be altered by an Act which in plain and unmistakable language referred to it; asserted the intention of the Legislature to alter it, and consequentially gave effect to that intention by its operative provisions. That argument was repelled by saying[12]:

> "It was not the policy of the Imperial Legislature at any relevant period to shackle or control in the manner suggested, the legislative power of the Nascent Australian Legislations."

Section 5 of the Colonial Laws Validity Act, 1865 was held to have clearly conferred on the colonial Legislatures a right to establish courts of judicature and to abolish and reconstitute them. A question had been raised that the Constitution Act of 1867 enacted certain fundamental organic provisions of such a nature as to render the Constitution controlled. It was said that if a change of that nature was contemplated, there would have been some indication in the very lengthy preamble of the Act, of that intention. Their Lordships could observe nowhere in the preamble the least indication that it was intended for the first time to make provisions which were sacrosanct, or which at least could only be modified by methods never previously required. It was finally held that the Legislature of Queensland was the master of its own household except insofar as its power had in special cases been restricted. No such restriction had been established and none in fact existed.

556. The Advocate-General of Maharashtra has sought to deduce the following propositions from the dissenting judgment of Issacs and Rich, JJ., of the Australian High Court which was approved by the Privy Council in the above case:

(1) Unless there is special procedure prescribed for amending any part of the Constitution, the Constitution is uncontrolled and can be amended by the manner laid down for enacting ordinary law and, therefore a subsequent law inconsistent with the Constitution would *pro tanto* repeal the Constitution.

(2) A Constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending them. In that case an ordinary law cannot amend

---

[11] 1920 AC 691.

[12] *Ibid.* p. 706.

SCC Online

them and the procedure must be strictly followed if the amendment is to be effected.

(3) The implication on limitation of power ought not to be imported from general concepts *but only from express or necessarily implied limitations* (emphasis supplied).

(4) While granting powers to the colonial Legislatures, the British Parliament as far back as 1865 refused to put limitations of vague character, but limited those limitations to objective standards e.g., statutes, statutory regulations, etc., to objective standards.

557. We have already repelled at an earlier stage[13] the contention that the only distinction between a controlled and an uncontrolled Constitution is that in the former the procedure prescribed for amending any part of the Constitution has to be strictly followed. The second proposition is of a similar nature and can hardly be disputed. As regards the third and fourth proposition all that need be said is that implied limitation which was sought in *McCawley's case* (supra) by counsel for the respondents was that the Queensland Legislature should first amend the Constitution and then pass an Act which would otherwise have been inconsistent, for the Constitution had not been amended. That contention in terms was rejected. The Constitution in *McCawley's case* (supra) was uncontrolled and, therefore, the Queensland Legislature was fully empowered to enact any Constitution breaking law. Moreover Lord Birkenhead in an illuminating passage in *McCawley's case*[14] has himself referred to the difference of view among writers upon the subject of constitutional law which may be traced "mainly to the spirit and genius" of the nation in which a particular Constitution has its birth". Some communities have "shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors". Those who have adopted the other view probably believed that "certainty and stability were in such a matter the supreme desiderata". It was pointed out that different terms had been employed by the text book writers to distinguish between those two contrasted forms of Constitution. It was added:

> "Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled Constitution as by any other nomenclature."

Lord Birkenhead did not make any attempt to define the two terms "controlled" and "uncontrolled" as precise legal terms, but merely used them as convenient expressions.

558. The next case of importance is *Attorney-General for New South Wales v. Trethowan*.[15] The Constitution Act, 1902, enacted by the Legislature of New South Wales, was amended in 1929 by adding Section 7-A which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission made in accordance with the section. The same provision was to apply to a Bill for repealing that section. In 1930 two Bills were passed by the Legislature. One was to repeal Section 7-A and the other to abolish the Legislative

---

[13] P. 432 (Para 540).
[14] 1920 AC 691 at p. 703-704.
[15] 1932 AC 526.

Council. Neither of the two Bills had been approved in accordance with Section 7-A. Reference was made to Section 5 of the Colonial Laws Validity Act, 1865, which conferred on the Legislature of the State full power to make laws inter alia in respect of the Constitution in such "manner and form" as might from time to time be provided by any Act of Parliament, Letters Patent, Colonial law in force in the colony etc. It was held that the whole of Section 7-A was within the competence of the Legislature of the State under Section 5 of the Colonial Laws Validity Act. The provision that the Bills must be approved by the electors before being presented was a provision as to form and manner and accordingly the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors voting. A number of contentions were raised, out of which the following may be noted :

(*a*) The Legislature of New South Wales was given by the Imperial Statutes plenary power to alter the Constitution, powers and procedure of such Legislature.

(*b*) When once the Legislature had altered either the Constitution or powers and procedure, the Constitution and powers and procedure as the previously existed ceased to exist and were replaced by the new Constitution and powers.

According to Their Lordships the answer depended entirely upon a consideration of the meaning of Section 5 of the Colonial Laws Validity Act read with Section 4 of the Constitution statute assuming that the latter section still possessed some operative effect. The whole of Section 7-A was held to be competently enacted. The Privy Council, however, held that the repealing Bill after its passage through both Chambers could not be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner. In order to be validly passed, the law must be passed in the manner prescribed by Section 7-A which was in force for the time being. *Trethowan's case* (supra) fully illustrates how the Privy Council enforced such limitations even though they were of a procedural nature which had been provided in a constitutional statute relating to the form and manner in which any such statute could be altered or repealed.

559-60. These decisions, in particular, *Trethowan's case* (supra) illustrate that the Privy Council has recognised a restriction on the legislative powers of a sovereign legislature even though that is confined only to the form and manner laid down in a Constitution for amending the Constitution Act. In a country which still sticks to the theory of Parliamentary sovereignty, limitations of any other nature would be regarded as somewhat non-conformist and unorthodox.

561. The decision of the Privy Council in *The Bribery Commissioner* v. *Pedrick Ranasinghe*[16] has been heavily relied on both sides. On behalf of the petitioners support has been sought from the observations relating to rights regarded as fundamental, being unalterable, what had happened there was that by virtue of Section 41 of the Bribery Amendment Act, 1956, a provision was made for the appointment of a Bribery Tribunal which was in conflict with the requirement in Section 55 of the Ceylon Constitution (Order In Council 1946), hereinafter called the 'Ceylon Constitution Act' according to which the appointment of Judicial Officers was vested in the Judicial Service Commission. Section 29 of the Ceylon Constitution Act provided by sub-section (1) that subject the provisions of the Order, the Parliament had the power to make laws for the peace, order and good government of the island. By sub-section (2) it was provided that no such law shall (*a*) prescribe or restrict the free exercise of any religion etc. This was followed by clauses (*b*), (*c*) and (*d*) which set out further religious and racial matters, which according to Their Lordships, could not be the subject of legislation. In the words of Their Lordships "they represent the solemn balance of rights between the citizens of Ceylon, the fundemental conditions on which inter se they accepted the Constitution; and these are, therefore, unalterable under the Constitution". By sub-section (3) any law made in contravention of sub-section (2) was to be void to the extent of such contravention. Sub-section (4) may be reproduced below:

---

[16] 1965 AC 172.

> "(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal assent unless it has endorsed on it a certificate under the hand of Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).
>
> Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law".

562. The Bribery Amendment Act, 1958 had not been enacted in accordance with the provisions contained in sub-section (4) of Section 29 of the Ceylon Constitution Act. As it involved a conflict with the Constitution, it was observed that a certificate of the Speaker as required by sub-section (4) was a necessary part of Act-making process. The point which engaged the serious attention of the Privy Council was that when a sovereign Parliament had purported to enact a Bill and it had received the Royal Assent, could it be a valid Act in course of whose passing there was a procedural defect, or was it an invalid Act which Parliament had no power to pass in that manner? A distinction was made while examining the appellant's arguments between Section 29(3) which expressly made void any Act passed in respect of the matters entrenched in and prohibited by Section 29(2); whereas Section 29(4) made no such provisions, but merely couched the prohibition in procedural terms. Reliance had been placed on behalf of the appellant Bribery Commissioner on the decision in *McCawley's case* (supra). It was pointed out that *McCawley's case* (supra) so far as it was material, was in fact opposed to the appellant's reasoning It was distinguished on the ground that the Ceylon Legislature had purported to pass a law which being in conflict with Section 55 of the Ceylon Constitution Act, must be treated, if it was to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. It was held that such alterations, even if expressed, could only be made by laws which complied with the special legislative procedure laid down in Section 29(4). The Ceylon Legislature did not have the general power to legislate so as to amend its Constitution by ordinary majority resolutions such as the Queensland Legislature was found to have under Section 2 of its Constitution Act.

563. The learned Advocate-General of Maharashtra has referred to the arguments in *Ranasinghe's case* (supra) and has endeavoured to explain the observations made about the entrenched provisions being unalterable by saying that the same were obiter. According to him it was not the respondent's case that any provision was unamendable. The references to the solemn compact etc. were also obiter because the appeal did not raise any question about the rights of religion protected by sub-section (2) of Section 29 and the issues were entirely different. It is claimed that this decision supports the position taken up on behalf of the respondents that it is *only the form and manner* which is material in a controlled Constitution and that the above decision is an authority for the proposition that in exercise of the amending power a controlled Constitution can be converted into an uncontrolled one. Any implied limitations on Parliament's amending power here can be abrogated by an amendment of Article 368 itself and the amending power can be enlarged by an exercise of that very power. According to Mr. Palkhivala this argument is wholly fallacious. Firstly, the observation of the Privy Council[17] is merely on the form and manner of amendment and has nothing to do with substantive limitations on the power of amendment. Placing limits on the amending power cannot be confused with questions of special legislative process which is also referred to by Their Lordships.[18] Secondly, the Ceylon Constitution authorised the Parliament to amend or repeal the Constitution, which power is far wider than the power of amendment simpliciter conferred by Article 368. It is suggested that *Ranasinghe's case* (supra) is a direct authority against the respondents since it held the religious and racial rights to be unalterable, which clearly implies that Parliament had no competence to take away those rights even in exercise of its power to amend the Constitution by following the prescribed form and manner in sub-section (4) of Section 29 of the Ceylon Constitution Act. The material importance of this case is that even though observations were made by the Lordships which may in a sense be obiter those were based on necessary implications arising from Section 29 of the Ceylon Constitution Act and were made with reference to interpretation of constitutional provisions which had a good deal of similarity (even on the admission of the Advocate-General of Maharashtra) with some parts of our Constitution, particularly those which relate to fundamental rights.

564. *Don John Francis Douglas Liyange* v. *The Queen*[19] is another decision on which strong reliance has been placed on behalf of the petitioners. The Ceylon Parliament passed an Act which substantially modified the Criminal Procedure Code *inter alia* by purporting to legalise *an ex-post facto* detention for 60 days of any person suspected of having committed an offence against the State. This class of offences for which trial without a jury by three Judges nominated by the Minister for Justice could be ordered was widened and arrest without a warrant for waging war against the Queen could be effected. New minimum penalties for that offence were provided. The Privy Council held that the impugned legislation involved a usurpation and infringement by the Legislature of judicial powers inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from political, legislative and executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck down as void. Their Lordships observed *inter alia* that powers in case of countries with written Constitutions must be exercised in accordance with the terms of the Constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of

---

[17] 1947 AC 198.

[18] *Ibid.* portions D to E.

[19] (1967) 1 AC 259.

Judges by the Judicial Service Commission and it was pointed out that these provisions manifested an intention to secure in the judiciary a freedom from political, legislative and executive control. It was said that these provisions were wholly appropriate in a Constitution which intended that judicial power shall vest only in the judicature. And they would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the Legislature.

565. There seem to be a good deal of substance in the submission of Mr. Palkhivala that the above decision is based on the principle of implied limitations; because otherwise under Section 29(1) of the Ceylon Constitution Act Parliament was competent to make laws for the peace, order and good government of the island subject to the provisions of the order. Strong obsevations were made on the true nature and purpose of the impugned enactments and it was said that the alterations made by them in the function of the judiciary constituted a grave and deliberate incursion in the judicial sphere.

565-A. The following passage is noteworthy and enlightening:

> "If such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the Judges. It is appreciated that the Legislature has no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution."

566. *Mohamed Samsudden Kariapper* v. *S. S. Wijesinha and Another*[20] has been cited on behalf of the State of Kerala for the proposition that judicial power could, by an amendment of our Constitution, be transferred to the Legislature thus negativing the principle of implied limitation. In that case a report had been made under the Commission of Inquiry Act about certain allegations of bribery having been proved against some members of the Parliament of whom the appellant was one. Under a certain Act civil disabilities on persons to whom the Act applied were imposed. It also contained a provision that in the event of inconsistency with existing law, the Act should prevail. The appellant challenged the validity of that Act on the ground that it was inconsistent with the Constitution and was usurpation of the judicial power. It may be mentioned that the speaker had, in accordance with the proviso to Section 29(4) of the Constitution of Ceylon, endorsed a certificate under his hand on the bill for imposition of Civil Disablities (Special Provisions) Act. The Privy Council held that the said Act was an exercise of legislative power and not the usurpation of judicial power. The Constitution of Ceylon was a controlled Constitution and the Act was an inconsistent law; the Act was to be regarded as amending the Constitution unless some provisions denying the Act constitutional effct was to be found in the constitutional restrictions imposed on the power of amendment. Apart from the proviso to Section 29(4) of the Constitution Act, there was no reason for not construing the words "amend or repeal" in that provision as extending to amendment or repeal by inconsistent law. The Act, therefore, amended the Constitution. Finally upon the merits it was observed that in view of the conclusion that the Act was a law and not an exercise of judicial power it was not necessary to consider the question whether Parliament could, by a law passed in accordance with the proviso to Section 29(4), both assume judicial power and exercise it in the one law.

---

[20] 1968 AC 717.

567. The above decision can certainly be invoked as an authority for the proposition in that even in a controlled Constitution where the form and manner had been followed of amending it, an Act, which would be inconsistent with it and which did not in express terms state that it was an amending act, would have the effect of altering the Constitution. But it does not support any suggestion, as has been made on behalf of the respondents, that judicial power could, by an amendment of our Constitution, be transferred to the Legislature. Moreover, as expressly stated by their Lordships, the Ceylon Constitution empowered the Parliament "to amend or repeal" the Constitution and, therefore, there can be no comparison between the scope of the Ceylon Parliament's amending power and that of the amending body under Article 368.

568. We may next deal with the Australian decisions because there has been a good deal of discussion in them about implied limitations which can arise in the absence of express limitations. The subject-matter of most of the decisions has been the Commonwealth's taxing power. Section 51 of Australian Constitution grants power to legislate with regard to taxation to the Commonwealth in wide terms but with certain express reservations, that duties of customs should be uniform, that the taxing laws must not discriminate between States, nor must revenue laws give preference to one State over another State. Section 114 bars the Commonwealth from taxing property of any kind belonging to a State. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*,[21] the High Court of Australia accepted the principles of construction of a Constitution laid down by the Privy Council in *Reg* v. *Burah*[22] and *Attorney-General of Ontario* v. *Attorney-General of Canada*[23] viz., that the only way in which a court can determine whether the prescribed limits of legislative power had been exceeded or not was "by looking to the trems of the instrument by which affirmatively, the legislative powers are created, and by which negatively they are restricted" nothing was to be read into it on ground of policy of necessity arising or supposed to arise from the nature of the federal form of government nor were speculations as to the motives of the Legislature to be entered into by the Court. These words would apparently appear to reject any proposition as to implied limitations in the Constitution against an exercise of power once it is ascertained in accordance with the ordinary rules of construction. Such an interpretation of the *Enginner's case*[24] supposed to have buried for ever the principle of implied limitations, has not been unanimously accepted nor has the above criterion laid down been adhered to. In *Attorney-General of New South Wales* v. *Brewery Employees Union*[25] Higgins, J., cautioned that "although the words of the Constitution are to be interpreted on the same principles of interpretation as are applied to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act to remember that it is a Constituion, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be". Sir Owen Dixon in *Australian Railways Union* v. *Victorian Railway Commissioners*[26] and later in *West* v. *Commissioner of Taxation*[27] formulated what in his view was the basic principle laid bown in *Engineers' case* (supra) and made observations relating to reservations of qualifications, which he thought had been made, concerning the prima facie rule of interpretation which that decision laid down. In *Ex parte Professional Engineers Association*[28] he once again adverted to the *Engineers' case* (supra) and suggested that perhaps "the reservations and qualifications therein expressed concerning the federal power of taxation and laws directed specially to the States and also perhaps the prerogative of the Crown received too little attention". The question as to implied limitations was directly raised and decided in the *Melbourne Corpoation* v. *Commonwealth.*[29] It was held that Section 48 of the Banking Act, 1945, prohibiting banks from conducting banking business for a State and for any authority of the State, including a local government authority was invalid. Two contentions were raised in that case: (1) that the impugned Act was not a law on banking within Section 51(*xiii*) because it was not a law with respect to banking, and (2) that the grant of power in Section 51(*xiii*) must be read subject to limitations in favour of the State because it appears in a Federal Constitution, so that even if Section 48 could be treated as a law with respect to banking, it was still invalid since its operation interfered with the States in the exercise of their governmental functions. The second contention was accepted by the majority. Lathadm, C. J., stated that laws which discriminated against States or which unduly interfered with States in the exercise of their functions of government were not laws authorised by the Constitution, even if they were laws with respect to a subject-matter within the legislative power of the Commonwealth Parliament. Rich, J., held that the Constitution expressly provided for the continued existence of the States and that, therefore, any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist or function as such was necessarily invalid because of inconsistency with the express provisions of the Constitution. Stark, J., said that the federal character of the Australian Constitution carried implications of its own, that the Government was a dual system based upon a separation of organs and of powers and, consequently, maintenance of the States and their powers was as much the object of the Constitution as maintenance of the Commonwealth and its powers. Therefore, it was beyond the power of either to abolish or destroy the other.

---

[21] (1920) 28 CLR 129.
[22] (1878) 3 AC 889.
[23] 1912 AC 571.
[24] (1920) 28 CLR 129.
[25] (1908) 6 CLR 469 at pp. 611-612.
[26] (1930) 44 CLR 319, 390.
[27] (1937) 56 CLR 657, 682.

569. The same contention was raised in a recent case of *Victoria* v. *The Commonwealth,*[30] where the Pay-roll Tax Act, 1941 and the Pay-roll Tax Assessment Act, 1941-1969 were impugned. These Acts were passed by the Commonwealth Parliament for financing the provisions of the Child Endowment Act, 1941 and casting the burden on employers by taxing wages paid by them. The Crown in right of a State was in each State a considerable employer of labour, and in some States of industrial labour. The Crown in right of a State was included in the definition of 'employer' for the purpose of the Act. The question raised for decision was about the constitutional validity of the Act insofar as it purported to impose upon the State of Victoria an obligation to Pay-roll Tax rated to the amount of salaries and wages paid to its public servants employed in certain department named in its statement of claim. The contention raised by the State of Victoria as summarised by Barwick, C. J., was that though the impugned Act fell under the enumerated power of taxation in Section 51 of the Constitution Act, that section did not authorise the imposition of a tax upon the Crown in the right of a State because there was an implied constitutional

[28] (1959) 107 CLR 208, 239.
[29] (1947) 74 CLR 31.
[30] (1971) 45 ALJ 251.

limitation upon that Commonwealth power operating universally, that is to say, as to all the activities of a State. The point most pressed, however, was in a somewhat limited form, viz., that the legislative power with respect to taxation did not extend to authorise the imposition of a tax upon "any essential governmental activity" of a State and, therefore, at the least, the power under Section 51 did not authorise a tax upon the State in respect of wages paid to its civil servants. In other words such a limitation, whether of universal or of limited operation, *was derived by implication* from the federal nature of the Constitution, and therefore, to levy a tax rated to the wages paid to its servants employed in departments of governments, so trenched upon the governmental functions of the State as to burden, impair and threaten the independent exercise of those functions. All the seven Judges agreed, firstly that the Act was valid, and secondly, upon the proposition laid down in the *Engineers' case* (supra) as also in certain other decisions that where a power was granted to the Commonwealth by a specific provision such as Section 51(*ii*) the Commonwealth could pass a law which would bind the States as it would bind individuals. The difference amongst the Judges, however, arose as regards the question of implied limitation on such a power, however, expressly granted. Barwick, C. J., and Owen, J., were of the view that a law which in substance takes a State or its powers or functions of government as its subject-matter is invalid because it cannot be supported upon any granted legislative power but there is no implied limitation on a Commonwealth legislative power under the Constitution arising from its federal nature. McTiernan, J., was also of the view that there was no necessary implication restraining the Commonwealth from making the law. However, Menzies, Windeyer, Walsh and Gibbs, JJ., held in categorial terms that there is an implied limitation on Commonwealth legislative power under the Constitution on account of its Federal nature. According to Menzies, J., a Constitution providing for indissoluble fedearal Commonwealth must protect both Commonwealth and States. The States were not outside the Constitution. Accordingly although the Constitution clearly enough subjected the States to laws made by Commonwealth Parliament it did so with some limitation Windeyer, J., read the *Melbourne Corporation case* (supra) as confirming the principle of implication and added that the Court in reading the Constitution "must not shy away from the word 'implication' and disavow every concept that it connotes". Walsh, J., rejected the contention that it was inconsistent with the principles of construction laid down in *Engineers' case* (supra) that the ambit of power with respect to enumerated subject-matter should be restricted in any way otherwise than by an express provision specially imposing some defined limitation upon it and observed :

> "There is a substantial body of authority for the proposition that the Federal nature of the Constitution does give rise to implications by which some limitations are imposed upon the extent of the power of the Commonwealth Parliament to subject the States to its legislation."

According to Gibbs, J., the ordinary principles of statutory interpretation did not preclude the making of implications when they were necessary to give effect to the intention of the legislature as revealed in the statute as a whole. The intention of the Imperial Parliament in enacting the Constitution was to give effect to the wishes of the Austsalian people to join in a federal union and to establish a federal and not a unitary system. In some respects the Commonwealth was placed in a position of supremacy as the national interest required but it would be inconsistent with the very basis of federation that the Commonwealth's power should extend to reducing the States to such a position of subordination that their very existence as independent units would be dependent upon the manner in which the Commonwealth exercises its powers, rather than on the legal limits of the powers themselves. He proceeded to say:

> "Thus, the purpose of the Constitution and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other."

570. The Advocate-General of Maharashtra does not dispute that there are necessary implications in a federal Constitution such as, for example, that any law violating any provision of the Constitution is void even in the absence of an express declaration to that effect. Again it is a necessary implication of a republican constitution that the sovereign of a foreign State—United Kingdom—cannot place Indian territory in groups by Orders in Council as provided in the Fugitive Offenders Act, and, therefore, that Act is inconsistent with the Republican Constitution of India, and is not continued in force by Article 372; see *State of Madras v. C. G. Menon*.[31] But he maintains that the principle of *Queen* v. *Burah*[32] is not in any way displaced. *Burah's case* (supra), according to him, laid down principles of interpretation and in doing so the Privy Council itself enunciated the doctrine of *ultra vires* which is a necessary implication of an Act of the British Parliament creating bodies or authorities with limited powers. An attempt has been made to show that the judgment of Chief Justice Barwick in the above Australian decision stated the basic principle of construction correctly and those principles are applicable to our Constitution also since the decision was based on *Queen* v. *Burah* (supra) which has been consistently followed by this Court, we have already dealt with that decision and we are unable to agree that *Queen* v. *Burah* (supra) stands in the way of drawing implications where the purpose of the Constitution and the scheme by which it is intended to be given effect, necessarily give rise to certain implications.

571. Turning to the Canadian decisions we need refer only to those which have a material bearing on the questions before us. In *the Attorney-General of Nova Scotia* v. *The Attorney-General of Canada*[33] the constitutionality of an Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa was canvassed. The Supreme Court of Canada held that since it contemplated delegation by Parliament of powers exclusively vested in it by Section 91 of the British North America Act to the Legislature of Nova Scotia; and delegation by that Legislature of powers, exclusively vested in Provincial legislature under Section 92 of the Act to Parliament, it could not be constitutionally valid. The principal ground on which the decision was based was that the Parliament of Canada and each Provincial Legislature is a sovereign body within its sphere, possessed of exclusive jurisdiction to legislate with regard to the subject-matter assigned to it under Section 91 or Section 92 as the case may be. Neither is capable, therefore, of delegating to the other the powers with which it has been vested nor of receiving from the other the power with which the other has been vested. The learned Chief Justice observed that the Constitution of Canada "does not belong either to the Parliament or to the Legislature; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled".

---

[31] (1955) 1 SCR 280: AIR 1954 SC 517: 1954 SCJ 621.

[32] (1878) 3 AC 889.

[33] 1951 Can LR 31.

Although nothing was expressly mentioned either in Section 91 or Section 92 of the British North America Act a limitation was implied on the power of Parliament and the Provincial Legislatures to delegate legislative power. Mention may also be made of *John Switzman* v. *Jreda Elbling*,[34] (to which we have already referred while dealing with the question of the use of the preamble). In that case the validity of the Act respecting communistic propaganda of the Province of Quebec was held to be *ultra vires* of the Provincial Legislatures. Abbot, J., after referring to various decisions of the Priyy Council as also of the Supreme Court of Canada[35] said that the Canada Election Act, the provisions of the British North America Act, which provided for Parliament meeting at least once a year and for the election of a new Parliament at least every five years and the Senate and House of Commons Act, were examples of enactments which made specific statutory provisions for ensuring the exercise of the right of public debate and public discussion. "Implicit in all such legislation is the right of candidates for Parliament or for a Legislature and of citizens generally, to explain, to criticise, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the potitical, economic and social principles advocated by such candidates or by the political parties or groups of which they may be member". That right could not be abrogated by a Provincial Legislature and its power was limited to what might be necessary to protect purely private rights. He was further of the opinion that according to the Canadian Constitution, as it stood, Parliament itself could not abrogate this right of discussion and debate.

572. The Advocate-General of Maharashtra has pointed out that these decisions relate to the legislative competence of Provincial Legislatures to affect civil liberties like freedom of speech, religion or to legislate in respect of criminal matters. They are not relevant for the purpose of determining the amending power under the Constitution. So far as the civil rights are concerned in Canada it is noteworthy, according to the Advocate-General, that the Canadian Bill of Rights, 1960 makes the rights therein defeasible by an express declaration that an Act of Parliament shall operate notwithstanding the Canadian Bill of Rights. It has also been submitted that the well known writers of constitutional law both of Australia and Canada have not attached any significance or accepted the principle of implied limitations.[36] The opinions of authors and writers have been cited before us so extensively, by both sides, that we find a great deal of conflict in their expression of opinion and it will not be safe to place any reliance on them. The judges who have read limitations by implication are well known and of recognised eminence and it is not fair to reject their views for the reasons suggested by the Advocate-General.

573. We need hardly deal at length with the Irish decisions. The principle emerging from the majority decision in *The State* (*at the prosecution of Jermiah Ryan*) v. *Captain Michael Lennons and Others*,[37] that under Section 50 of the 1922 Constitution (which provided for constitutional amendment by ordinary legislation during the first period of 8 years which was subsequently extended to 16 years) an ordinary law inconsistent with the provisions of the Constitution had the effect of amendment of the Constitution, caused considerable debate. During the controversy it was strongly urged that the power of constitutional amendment was not identical with pouvoir constituent; that it was not within the competence of agencies invested with the power of constitutional amendment to drastically revise the structural organisation of a State, to change a monarchical into a republican and a representative into a direct form of government. The argument was based on the conception underlying Article 2 of the French Law of 1884 which provided that the Republican form of government could not be made subject of constitutional amendment. Section 50 of that Constitution, in particular, was criticized as being too pliant for the first period of 8 years and too rigid for the period following it.[38] After the 1937 Constitution which became a model for our Constitution-makers the trend of judicial thinking underwent a transformation and instead of treating an Act inconsistent with the Constitution as having the effect of impliedly amending the Constitution such an Act was regarded as invalid to the extent of its inconsistency with the Constitution. See *Edmund Burke* v. *Lenon*[39] and *Margaret Buckley* v. *Attorney General of Eire*.[40] The 1922 Constitution was considered to be of such "light weight" that there were no fewer than 27 Acts expressed to be Acts impliedly amending that Constitution within a period of 15 years.[41] During the period 1922-27 the judges were used to the British idea of sovereignty of Parliament and notions of fundamental law were foreign to their training and tradition. The 1937 Constitution is more rigid than its predecessor though Article 51 permits the Oireachtas to amend the Constitution during the first three years by ordinary legislation. Such Legislation, however, is expressly excepted unlike Article 50 of the 1922 Constitution from the amending power. Mention may be made of *The State* v. *The Minister for Justice etc.*[42] in which it was held that the provisions of Section 13 of the Lunatic Asylums (Ireland) Act, 1875 which prevented an accused person from appearing before the District Court on the return date of his remand constituted interference with an exercise of judicial power to administer justice. This case and similar cases e.g., *Margaret Buckley* v. *Attorney-General of Eire*[43] may not afford much assistance in determining the question about implied limitation to the amending power in a Constitution because they deal with the question mostly of repugnancy of ordinary legislation to constitutional provisions. The main decision however, was in *Ryan's case*[44] in which Kennedy, C. J., drew various implications from the Constitution but the majority of judges declined to do so and read the word "amendment" as wide enough to allow the repeal of a number of articles, however, important in substance they might be. It is equally unnecessary to deal with the argument on behalf of the respondents that the Privy Council in *Moore* v. *Attorney-General of Irish Free State*,[45] rejected the contention of the counsel based on the reasoning of Kennedy, C. J., *Moore's case* (supra) was decided principally on the effect of the passing of the statute of Westminster as is clear from the summing up of the position by Their Lordships.[46]

---

[34] 1957 Can LR (SC) 285 at p. 327.

[35] *See* in particular the observation of Duff, C. J., in *Alberta Statutes Case*, 1938 SCR (Canada) 100 at pages 132-133.

[36] *See* W. A. Wynes: *Legislative Executive and Judicial Powers in Australia and Bora Laskin: The Canadian Constitution Law.*

[37] 1935 Irish Reports 170.

574. As regards the position in the United States of America a great deal of reliance has been placed on behalf of the respondents on *United States of America* v. *William H. Sprague*.[47] According to that decision the choice between submission of a proposed amendment to the federal Constitution to State Legislatures and submission to State Conventions under Article 5 of the

---

[38] Leo Kohn: *The Constitution of the Irish Free State*, pp. 257-259.
[39] 1940 Irish Reports 136.
[40] 1950 Irish Reports 67.
[41] *See* generally J. N. Kelly: *Fundamental Rights on the Irish Law and Constitution* (*1968*), pp. 1-17.
[42] 1967 Irish Reports 106.
[43] 1950 Irish Reports 67.
[44] 1935 Irish Reports 170.
[45] 1935 AC 484.
[46] *Ibid.* p. 498.
[47] 75 L Ed 640.

Constitution was in the sole discretion of Congress irrespective of whether the amendment was one dealing with the machinery of government or with matters affecting the liberty of the citizen. It was argued that amendments may be of different kinds, e. g , mere changes in the character of federal means of machinery on the one hand, and matters affecting the liberty of the citizen, on the other. It was said that the framers of the Constitution accepted the former sort to be ratified by the Legislature whereas they intended that the latter must be referred to the people because not only of lack of power in the Legislature to ratify but also because of doubt as to their truly representing the people. The Court observed that where the intention was clear there was no room for construction and no excuse for interpolation or addition and it had been repeatedly and consistently declared in earlier decisions that the choice of mode rested solely in the discretion of the Congress. It is sought to be concluded from this decision that the Supreme Court of the United States refused to read any implications of the nature argued in that case.

575. Mr. Palkhivala says that the decision in *U. S.* v. *W. H. Sprague* (supra) has no relevance to the questions before us. All that it laid down was that the Congress had the sole discretion to decide whether a proposed amendment should be submitted to State Legislatures or to the State conventions. The language of Article 5 itself shows that sole discretion in this matter is conferred on the Congress irrespective of whether the amendment deals with the machinery of government or with matters affecting the rights and liberties of the citizen. *Sprague's case* (supra) it is suggested, was merely a fresh attempt after the decision of the Supreme Court in the *State of Rhode Island* v. *A. Mitchell Palmer*[48] to argue that the 18th Amendment which introduced prohibition was unconstitutional since it was ratified by the State Legislatures and the attempt rightly failed. For the reasons suggested by Mr. Palkhivala, which appear to have a good deal of substance we are unable to derive any help from *U. S.* v. *W. H. Sprague* (supra).

576. The Advocate General of Maharashtra has invoked another principle to the effect that unless the power of amendment is co-extensive with the judicial power of invalidating laws made under the Constitution the judiciary would be supreme; therefore, the power of amendment should be co-extensive with judicial power. This follows from what has been repeatedly held by this Court that under our Constitution none of the three great departments of the State is supreme and it is only the Constitution which is supreme and which provides for a government of laws and not of men. The reply of Mr. Palkhivala is that if the Constitution is supreme, as it is, it necessarily follows that there must be limitation on the amending power because if there are no limitation the Legislature would be supreme and not the Constitution. If the Legislature's power of amending Constitution were co-extensive with the judicial power of invalidating laws made under the Constitution, the Legislature can bend the Constitution to its wheel in every way which will lead to a result contrary to what has been provided in the Constitution, namely, that there are three great departments of the State and no one can have supermacy over the other. When the judiciary places a limitation on the amending powers, says, Mr. Palkhivala, only as a matter of true construction the consequence is not that the judiciary is supreme but that the Constitution is supreme. It is claimed that on his arguments, the Legislature, executive and judiciary remain co-ordinate which is the correct position under the Constitution. If the respondent's argument is accepted the amending power is absolute and limitless. It can make the judiciary and the executive completely subordinate to it or take over their powers.

---

[48] 64 L Ed 946.

577. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose, J., in *Bidi Supply Co.* v. *The Union of India.*[49] The observations of Patanjali Sastri, C. J., in *State of Madras* v. *V. G. Row*[50] which have become *locus classicus* need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusador's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in *Commonwealth of Australia* v. *Bank of New South Wales*[51]:

> "The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament."

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in *Ranasinghe's case* (supra). The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L. C. in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*[52] and *Ex Parte Walsh & Johnson; In re Yates.*[53] The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the Legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate-General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that judges declare but not make law. To this may be added the none too

---

[49] 1956 SCR 267: AIR 1956 SC 479: 1956 SCJ 492.

[50] 1952 SCR 597: AIR 1952 SC 196: 1952 SCJ 253.

[51] 1950 AC 235 at 310.

[52] 1914 AC 237.

[53] (1925) 37 CLR 36 at p. 58.

SCC Online

rigid amendatory process which authorises amendment by means of 2/3 majority and the additional requirement of ratification.

578. According to the learned Attorney-General the entire argument on the basis of implied limitations is fundamentally wrong. He has also relied greatly on the decision in *Burah's case* (supra) and other similar decisions. It is pointed out that there can be no inherent limitation on the power of amendment having regard to the purpose for which the power is needed. The argument about the non-amendability of the essential framework of the Constitution is illusive because every part of a constitutional document admits of the possibility of imperfect drafting or ambiguity. Even basic concepts or ideals undergo progressive changes. It has been strenuously urged that the Constitution read as a whole did not contemplate the perpetuation of the existing social and economic inequalities and a duty has been cast on the State to organise a new social order. The Attorney-General quoted the opinion of several writers and authors in support of his contention that there must be express words of limitation in a provision which provides for amendment of the Constitution from which it follows that no implied limitations can be read therein.

579. The correct approach to the question of limitations which may be implied in any legislative provisions including a constitutional document has to be made from the point of view of interpretation. It is not a novel theory or a doctrine which has to be treated as an innovation of those who evolve heterodox methods to substantiate their own thesis. The argument that there are no implied limitations because there are no express limitations is a contradiction in terms. Implied limitations can only arise where there are no express limitations. The contention of the learned Attorney-General that no implications can be read in an amending power in a Constitution must be repelled in the words of Dixon, J., in *West* v. *Commissioner of Taxation* (*N. S. W.*) :[54]

> "Since the *Engineers' case* (supra) a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied."

580. We are equally unable to hold that in the light of the Preamble, the entire scheme of the Constitution, the relevant provisions thereof and the context in which the material expressions are used in Article 368 no implied limitations arise to the exercise of the power of amendment. The respondents do not dispute that certain limitations arise by necessary implication e. g., the Constitution cannot be abrogated or repealed in its entirety and that the India's polity has to be of a Sovereign Democratic Republic, apart from several other implications arising from Article 368 which have been noticed.

581. The argument that the Nation cannot grow and that the objectives set out in the Preamble cannot be achieved unless the amending power has the ambit and the width of the power of a Constituent Assembly itself or the People themselves appears to be based on grounds which do not have a solid basis. The Constitution-makers provided for development of the country in all the fields social, economic and political. The structure of the Constitution has been erected on the concept of an egalitarian society.

---

[54] (1936-37) 56 CLR 657.

But the Constitution-makers did not desire that it should be a society where the citizen will not enjoy the various freedoms and such rights as are the basic elements of those freedoms, e. g., the right to equality, freedom of religion etc., so that his dignity as an individual may be maintained. It has been strongly urged on behalf of the respondents that a citizen cannot have any dignity if he is economically or socially backward. No one can dispute such a statement but the whole scheme underlying the Constitution is to bring about economic and social changes without taking away the dignity of the individual. Indeed, the same has been placed on such, a high pedestal that to ensure the freedoms etc., their infringement has been made justiciable by the highest court in the land. The dictum of Das, C. J., in *Kerala Education Bill case* (supra) paints the true picture in which there must be harmony between Parts III and IV; indeed the picture will get distorted and blurred if any vital provision out of them is cut out or denuded of its identity.

582. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

(1) The supermacy of the Constitution.
(2) Republican and Democratic form of government and sovereignty of the country.
(3) Secular and federal character of the Constitution.
(4) Demarcation of power between the Legislature, the executive and the judiciary.
(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
(6) The unity and the integrity of the Nation.

583. The entire discussion from the point of view of the meaning of the expression "amendment" as employed in Article 368 and the limitations which arise by implications leads to the result that the amending power under Article 368 is neither narrow nor unlimited. On the footing on which we have proceeded the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.

584. We may next deal with the validity of the Constitution (25th Amendment) Act, Section 2 of the Amendment Act provides:

> "2. In Article 31 of the Constitution,—
>
> (a) for clause (2), the following clause shall be *substituted*, namely:
>
> "(2) No property shall be compulsorily acquired or

SCC Online

> requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:
>
> Provided... . ...
>
> (*b*) after clause (2-A), the following clause shall be inserted, namely:
>
> (2-B). Nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)."

As stated in the Statement of Objects and Reasons to the Bill (No. 106 of 1971) the word "compensation" was sought to be omitted from Article 31(2) and replaced by the word "amount". It was being clarified that the said "amount" may be given otherwise than in cash. It was also provided that Article 19(1)(*f*) shall not apply to any law relating to acquisition or requisitioning of property for a public purpose. The position of the respondents is that "compensation" had been given the meaning of market value or the just equivalent of what the owner had been deprived of according to the decisions of this Court.[55] That had led to the 4th Amendment Act, 1955. The later decisions[56] had continued to uphold the concept of "compensation" i. e., just equivalent of the value of the property acquired in spite of the amendments made in 1955. In *State of Gujarat* v. *Shantilal Mangaldas and Others*,[57] the decision in *Metal Corporation of India*,[58] was overruled which itself was virtually overruled by *R. C. Cooper* v. *Union of India*.[59] According to the Advocate-General of Maharashtra, if *Shantilal Mangaldas case* (supra), had not been overruled by *R. C. Cooper* v. *Union of India* (supra), there would have been no necessity of amending Article 31(2).

585. The first question that has to be determined is the meaning of the word "amount". Unlike the word "compensation" it has no legal connotation. It is a neutral, colourless word. The dictionary meanings do not help in arriving at its true import as used in a constitutional provision. It can be anything from one paisa to an astronomical figure in rupees. Its meaning has, therefore, to be ascertained by turning to the context in which it is used and the words preceding it as well as following it.

586. The scheme of Article 31(2) now is:

(1) The property has to be compulsorily acquired or requisitioned.

(2) It has to be for a public purpose.

(3) It has to be by a law.

---

[55] See *State of West Bengal* v. *Mrs. Bela Bannerji*, 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.

[56] *Vajravelu Mudalier* v. *Special Deputy Collector, Madras*, 1965 SCR 614: AIR 1965 SC 1017: (1964)2 SCJ 703; *Union of India* v. *Metal Corporation of India*, (1967) 1 SCR 255: AIR 1967 SC 637: (1967) 1 SCJ 182.

[57] (1969) 3 SCR 341 :(1969) 1 SCC 509.

[58] (1967) 1 SCR 255: AIR 1967 SC 637: (1967) 1 SCJ 182.

[59] (1970) 3 SCR 530: (1970) 1 SCC 248.

(4) The law must provide for an amount which may be—
  (*i*) fixed by such law, or
  (*ii*) which may be determined in accordance with such principles as may be specified in such law.

(5) The law shall not be questioned in a Court on the ground—
  (*i*) the amount so fixed or determined is not adequate, or
  (*ii*) the whole or any part of such amount is to be given otherwise than in cash.

It is significant that the amount can be determined in accordance with specified principles, if it is not fixed by the law itself. Moreover, its adequacy cannot be questioned in a court. The use of the word "principles" and the question of inadequacy can only arise if the amount has some norm. If it has no norm no question of specifying any principles arises nor can there be any occasion for the determination of its adequacy. The very fact that the court is debarred from going into the question of adequacy shows that the "amount" can be adequate or inadequate. Even if it is inadequate, the fixation or determination of that amount is immune from any challenge. It postulates the existence of some standard or norm without which any enquiry into adequacy becomes wholly unnecessary and irrelevant. Moreover, either method of giving an amount must bring about the same result. In other words, if Rs. 1,000 is the amount to be given for acquisition of a property, it must be either fixed or must be determinable by the principles specified in the event of its not being fixed. It could not be intended that the two alternative modes should lead to varying results, i. e., it could be fixed at Rs. 1,000 but if the principles are specified they do not yield that figure.

587. The Advocate-General of Maharashtra says that the right of the owner is just what the Government determines it to be. It can give what it pleases and when it choses to do so. Such an argument is untenable and introduces an element of arbitrariness which cannot be attributed to the Parliament.

588. In *Shantilal Mangal Das case* (supra), which, on the submission of the Advocate General, enunciated the correct principles relating to Article 31(2) as it then stood, it was laid down that something fixed or determined by the application of specified principles which was illusory or could in no sense be regarded as compensation was not bound to be upheld by the Courts, "for to do so would be to grant a charter of arbitrariness and permit a device to defeat the constitutional guarantees". It was added that the principles could be challenged on the ground that they were irrelevant to the determination of compensation but not on the plea that what was awarded was not just or fair compensation. Thus it was open to the courts to go into the question of arbitrariness of the amount fixed or its being illusory even under the law laid down in *Shantilal Mangal Das case* (supra). The relevance of the principles had also been held to be justiciable. *R. C. Cooper's case* (supra), did not lay down different principles. But the observations made therein were understood to mean that the concept of just equivalent not accepted in *Shantilal's case* (supra) was restored. The amendment now made is apparently aimed at removing that concept and for that reason the word "amount" has been substituted in place of "compensation". This is particularly so as we find no reason for departing from the well-settled rule that in such circumstances the Parliament made the amendment knowing full well the ratio of the earlier decisions.

589. The Advocate-General of Maharashtra has submitted that the fixing of the amount or alternatively specifying the principles for determining that amount is entirely within the judgment of the Legislature and the whole object of the amendment is to exclude judicial review which had been introduced by the courts on the basis of the concept of compensation. But even then the members of the Legislature must have some basis or principles before them to fix the amount as the same cannot be done in an arbitrary way. He, however, gave an unusual explanation that in the Cabinet system of government it is for the Government to determine the amount or specify such principles as it chooses to do. The legislators belonging to the ruling party are bound to support the measure whether the basis on which the amount has been determined is disclosed to them or not. It is wholly incomprehensible how there can be any legislative judgment or decision unless there is room for debate and discussion both by members of the ruling party and the opposition. For any discussion on the "amount" fixed or the principles specified the entire basis has to be disclosed. There can be no basis if there is no standard or norm.

590. The learned Solicitor-General agrees that Article 31(2) after amendment still binds the Legislature to provide for the giving to the owner a sum of money either in cash or otherwise. In fixing the "amount", the Legislature has to act on some principle. This is not because of any particular obligation arising out of Article 31(2) but from the general nature of legislative power itself. Whatever the subject or the nature of legislation it always proceeds on a principle—it is based on legislative policy. The principle may include considerations of social justice. Judicial review on the ground of inadequacy of the "amount" and the manner of payment is excluded by express language. No other question is excluded. The expropriated owner still continues to have a fundamental right. This argument is not quite the same as that of the learned Solicitor-General.

591. It is true that the "amount" to be paid to an owner may not be the market value. The price of the property might have increased owing to various factors to which no contribution has been made by the owner. The element of social justice may have to be taken into consideration. But still on the learned Solicitor-General's argument, the right to receive the "amount" continues to be a fundamental right. That cannot be denuded of its identity. The obligation to act on some principle while fixing the amount arises both from Article 31(2) and from the nature of the legislative power. For, there can be no power which permits in a democratic system an arbitrary use of power. If an aggrieved owner approaches the court alleging that he is being deprived of that right on the grounds now open to him, the Court cannot decline to look into the matter. The Court will certainly give due weight to legislative judgment. But the norm or the principles of fixing or determining the "amount" will have to be disclosed to the Court. It will have to be satisfied that the "amount" has reasonable relationship with the value of the property acquired or requisitioned and one or more of the relevant principles have been applied and further that the "amount" is neither illusory nor it has been fixed arbitrarily, nor at such a figure that it means virtual deprivation of the right under Article 31(2). The question of adequacy or inadequacy, however, cannot be gone into.

592. As to the mode of payment, there is nothing to indicate in the amended Article that any arbitrary manner of payment is contemplated. It is well known that a discretion has to be exercised reasonably.

593. As regards clause (2-B) inserted in Article 31 which makes Article 19(1)(*f*) inapplicable, there is no reason for assuming that a procedure will be provided which will not be reasonable or will be opposed to the rules of natural justice. Section 2 of the 25th Amendment can be sustained on the construction given to it above.

594. We now come to the most controversial provision of the 25th Amendment, namely, Section 3 which inserted the following article:

> "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

According to the Statement of Objects and Reasons contained in Bill No. 106 of 1971, the new article has been introduced to provide that if any law is passed to give effect to the Directive Principles contained in clauses (*b*) and (*c*) of Article 39 and contains a declaration to that effect, such law shall not be deemed to be void on the ground that it takes away or abridges any of the rights contained in Articles 14, 19 or 31 and shall not be questioned on the ground that it does not give effect to these principles. For this provision to apply in case of laws made by State Legislatures it is necessary that the relevant Bill should be reserved for the consideration of the President and receive his assent.

595. Article 39 contains certain principles of policy to be followed by the State. It enjoins the State inter alia to direct its policy towards securing:

> "39. (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"

596. These provisions together with the other provisions of the Constitution contain one of the main objectives, namely, the building of a welfare State and an egalitarian social order in our country. As stated before, the fundamental rights and the directive principles have been described as the "conscience of our Constitution". The Constitution-makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man and to bring about a socio-economic transformation based on principles of social justice. While the Constitution-makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual. Part III of the Constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual. Our Constitution-makers did not contemplate any disharmony between the fundamental rights and the directive principles. They were meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal was to be achieved. While on behalf of the petitioners greater emphasis has been laid on the fundamental rights, counsel for the respondents say that the fundamental rights should be subordinate to the directive principles. The Constitutent Assembly did not accept such a proposal made by B. N. Rau. It has been suggested that a stage has been reached where it has become necessary to abrogate some of the basic freedoms and rights provided the end justifies the means. At an earlier stage in the development of our constitutional law a view was taken that the Directive Principles of State policy had to conform and run subsidiary to the Chapter on Fundamental Rights, but Das, C. J., in *Kerala Education Bill, 1957* laid down the rule of harmonious construction and observed that an attempt should be made to give effect to both the fundamental rights and the directive principles.

597. According to Mr. Palkhivala, Article 31-C destroys several essential features of the Constitution. He says that there is a vital distinction between two cases: (*a*) where fundamental rights are amended to permit laws to be validly passed which would have been void before the amendment and (*b*) the fundamental rights remain unamended, but the laws which are void as offending those rights are validated by a legal fiction that they shall not be deemed to be void. He further points out that on the analogy of Article 31(*c*) it would be permissible to have an omnibus Article that notwithstanding anything contained in the Constitution no law passed by Parliament or any State Legislature shall be deemed to be void on any ground whatsoever. Article 31-C according to him gives a blank charter not only to Parliament but all the State Legislatures to amend the Constitution. On the other hand, the argument on behalf of the respondents is that Article 31-C is similar to Articles 31-A and 31-B and that the object of inserting the article is to free certain kinds of laws from the limitation on legislative power imposed by conferment of fundamental rights by Part III of the Constitution. As those rights were justiciable under Article 32, says the Advocate-General of Maharashtra, the only way of doing so was to exclude judicial review of legislation in respect of those laws. If Article 31-A is valid, there is no reason or justification for saying that Article 31-C suffers from all the vices pointed out by Mr. Palkhivala.

598. According to the Solicitor-General, Article 31-C protects only law and not mere executive action. Law can be made by either Parliament or the State Legislatures. Article 31-C has been enacted for the purpose of achieving the objectives set out in clauses (*b*) and (*c*) of Article 39. The law enacted under it will operate on "material resources", "concentration of wealth" and "means of production". The legislative effort would generally involve: (*i*) nationalisation of material resources of the community and (*ii*) imposition of control on the production, supply and distribution of the products of key industries and essential commodities. It, therefore, impinges on a particular kind of economic system only.

599. The question of the validity of Article 31-C to our mind has to be examined mainly from two points of view; the first is its impact on the various freedoms guaranteed by Article 19, the abrogation of the right of equality guaranteed by Article 14 and the right to property contained in Article 31. The second is whether the amending body under Article 368 could delegate its amending power to the Legislatures of the Union and the States. Alternatively, whether the Parliament and the State Legislatures can, under Article 31-C, amend the Constitution without complying with the form and manner laid down in Article 368. Now it is quite obvious that under Article 31-C, a law passed by the Parliament or the State Legislatures shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 so long as the law is declared to be one for giving effect to the policy of the State towards securing the principles specified in clause (*b*) and clause (*c*) of Article 39. If Article 31-C is aimed at the removal of a particular economic system, as suggested by the Solicitor-General, it is difficult to understand why the freedoms contained in clauses (*a*) to (*d*) of Article 19 as also the right of equality under Article 14 had to be taken away. The power of enacting Constitution breaking laws have been entrusted even to a small majority in a State Legislature. Mr. Palkhivala points out that the freedom of the Press, for instance, can be destroyed under Article 31-C as the respondents claim the right to nationalise any industrial or economic activity. Moreover, a person can be put in prison for commending a policy contrary to the Government's policy. Such legislation cannot be challenged as Article 19(1)(*a*) will not apply and Article 21 permits deprivation of personal liberty according to procedure established by law. The case in the *State of Bombay and Another* v. *F. N. Balsara*,[60] is in point. Commending the use of an intoxicant had been made an offence. It was struck down by this Court as violative of Article 19(1)(*a*). If Article 31-C is constitutional, such a provision made in a law enacted under it relating to mattars falling within Article 39(*a*) and (*b*) would be valid. As a matter of fact no cogent or convincing explanation has been given as to why it was necessary to take away all the freedoms guaranteed by Article 19 and for the abrogation of the prized right of equality under Article 14 of which has been described as the basic principle of republicanism.[61] This Article combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Constitution.[62] It follows, therefore that Article 31-C impinges with full force on several fundamental rights which are enabled to be abrogated by the Parliament and the State Legislatures.

600. As regards the question of delegation of amending power, it is noteworthy that no amendment has been made in Article 368 itself to enable delegation of constituent power The delegation of such power to the State Legislatures, in particular, involves serious consequences. It is well settled that one Legislature cannot create another legislative body. This has been laid down very clearly in two decisions of the Privy Council. In the *Initiative and Referendum Act*,[63] which has already been discussed,[64] by us no doubt was entertained that a body that had the power of legislation on the subjects entrusted to it, even though, the power was so ample as that enjoyed by a provincial Legislature in Canada, could not create and endow with its own capacity a new legislative power not created by the Act to which it owed its own existence. *Attorney-General of Nova Scotia* v. *The Attorney-General of Canada*,[65] is another direct authority for the view that the Parliament of

---

[60] 1951 SCR 682: AIR 1951 SC 318: 1951 SCJ 478.

[61] *State of West Bengal* v. *Anwar Ali Sarkar*, (*Per* Patanjali Sastri, C. J.), 1952 SCR 284 at p. 293: (*Ibid* p. 313 Mahajan, J.). AIR 1952 SC 75: 1952 SCJ 55.

[62] *Basheshar Nath* v. *The Commissioner of Income Tax, Delhi and Rajasthan* (per Das, C. J.) 1959 Supp 1 SCR 528 at 551: AIR 1959 SC 149: (1959) 35 ILR 190

[63] 1919 AC 935.

[64] P. 438 (Para 553).

[65] 1951 Can LR 31.

Canada or any of the Legislatures could not abdicate their powers and invest for the purpose of legislation bodies, which by the very terms of the British North American Act were not empowered to accept such delegation and to legislate on such matters. The distinction made by counsel on behalf of the respondents and the cases relied on by them have been fully discussed in the judgment of the learned Chief Justice and we need not go over the same ground.

601. The only way in which the Constitution can be amended, apart from Articles 4, 169 and the relevant paras in Schedules V and VI of the Constitution, is by the procedure laid down by Article 368. If that is the only procedure prescribed, it is not possible to understand how by ordinary law the Parliament or the State Legislatures can amend the Constitution, particularly, when Article 368 does not contemplate any other mode of amendment or the setting up of another body to amend the Constitution. The other difficulty which immediately presents itself while examining Article 31-C is the effect of the declaration provided for in the article. It is possible to fit in the scheme of Article 31-C any kind of social or economic legislation. If, the court are debarred from going into the question whether the laws enacted are meant to give effect to the policy set out in Article 39(*b*) and (*c*), the Court will be precluded from enquiring even into the incidental encroachment on rights guaranteed under Articles 14, 19 and 31. This is not possible with regard to laws enacted under Article 31-A. Those laws can be sustained if they infringe the aforesaid articles only to the extent necessary for giving effect to them. Although on behalf of the respondents it is said that the Court can examine whether there is any nexus between the laws made under Article 31-C and Article 39(*b*) and (*c*), there would hardly be any law which can be held to have no nexus with Article 39(*b*) and (*c*), the ambit of which is so wide.

602. The essential distinction between Articles 31-A and 31-C is that the former is limited to specified topics; whereas the latter does not give the particular subject but leaves it to the Legislatures to select any topic that may puport to have some nexus with the objectives in Article 39(*b*) and (*c*). In other words, Article 31-C deals with objects with unlimited scope.

603. The argument that Article 31-C lifts the ban placed on State Legislature and Parliament under Articles 14, 19 and 31 and further that it may be considered as an amendment of Article 368, has been discussed by the learned Chief Justice in his Judgment delivered today and we adopt, with respect, his reasoning for repelling them.

604. In our judgment Article 31-C suffers from two kinds of vice which seriously affect its validity. The first is that it enables total abrogation of fundamental rights contained in Articles 14, 19 and 31 and secondly, the power of amendment contained in Article 368 is of special nature which has been exclusively conferred on the Parliament and can be exercised only in the manner laid down in that article. It was never intended that the same could be delegated to any other Legislature including the State Legislatures.

605. The purpose sought to be achieved by Article 31-C may be highly laudable as pointed out by the learned Solicitor General, but the same must be achieved by appropriate laws which can be constitutionally upheld. We have no option, in view of what has been said except to hold that the validity of Article 31-C cannot be sustained.

606. The last matter for determination is the validity of the 29th Amendment Act, 1972. The challenge is only against the inclusion of two Acts, namely, the Kerala Land Reforms (Amendment) Act, 1969 and similar Kerala Act of 1971 in the Ninth Schedule to the Constitution.

607. The main argument on behalf of the petitioners has been confined to the relationship between Article 31-A and Article 31-B. It has been contended that Article 31-B is intimately linked with Article 31-A and, therefore, only those legislative enactments which fall under Article 31-A can be included in the 9th Schedule under Article 31-B. This matter is no longer open to argument as the same stands settled by a series of decisions of this Court. See *State of Bihar* v. *Maharajadhiraj Sir Kameshwar Singh of Darbhanga and Others*[66]; *Visweshar Rao* v. *The State of Madhya Pradesh*[67] and *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant Thana.*[68] In all these cases it was held that Article 31-B was independent of Article 31-A. A matter which has been settled for all these years cannot be re-opened now. It will still be open, however, to the Court to decide whether the Acts which were included in the Ninth Schedule by 29th Amendment Act or any provision thereof abrogates any of the basic elements of the constitutional structure or denudes them of their identity.

608. Our conclusions may be summarised as follows:

(1) The decision in *Golak Nath case* (supra) has become academic, for even if it be assumed that the majority judgment that the word 'law' in Article 13(2), covered constitutional amendments was not correct, the result on the questions, wider than those raised in *Golak Nath case* (supra) now raised before us would be just the same.

(2) The discussion on the 24th Amendment leads to the result that—

(*a*) the said amendment does not more than to clarify in express language that which was implicit in the unamended Article 368 and that it does not or cannot add to the power originally conferred thereunder;

(*b*) though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features;

(*c*) even if the amending power includes the power to amend Article 13(2), a question not decided in *Golak Nath case* (supra) the power is not so wide so as to include the power to abrogate or take away the fundamental freedoms; and

(*d*) the 24th Amendment Act, read as aforesaid, is valid.

(3) Clause (2) of Article 31, as substituted by Section 2 of the 25th Amendment, does not abrogate any basic element of the Constitution nor does it denude it of its identity because—

(*a*) the fixation or determination of "amount" under that article has to be based on some norm or principle which must be relevant for the purpose of arriving at the amount payable in respect of the property acquired or requisitioned;

---

[66] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 354.

[67] 1952 SCR 1020: AIR 1952 SC 252, 296: 1952 SCJ 354, 427.

[68] (1965) 1 SCR 636: AIR 1965 SC 1096.

(*b*) the amount need not be market value but it should have a reasonable relationship with the value of such property;

(*c*) the amount should neither be illusory nor fixed arbitrarily; and

(*d*) though the courts are debarred from going into the question of adequacy of the amount and would give due weight to legislative judgment, the examination of all the matters in (*a*), (*b*) and (*c*) above is open to judicial review.

(4) As regards clause (2-B) inserted in Article 31 which makes Article 19(1)(*f*) inapplicable, there is no reason to suppose that for determination of the amount on the principles laid down in the law any such procedure will be provided which will be unreasonable or opposed to the rules of natural justice.

(5) On the above view Section 2 of the 25th Amendment is vaild.

(6) The validity of Section 3 of the 25th Amendment which introduced Article 31-C in the Constitution cannot be sustained because the said article suffers from two vices. The first is that it enables abrogation of the basic elements of the Constitution inasmuch as the fundamental rights contained in Articles 14, 19 and 31 can be completely taken away and, secondly, the power of amendment contained in Article 368 is of a special nature which has been exclusively conferred on Parliament and can be exercised only in the manner laid down in that article. The same could not be delegated to any other Legislature in the country. Section 3, therefore, must be declared to be unconstitutional and invalid.

(7) The 29th Amendment is valid. However, the question whether the Acts included in the Ninth Schedule by that amendment or any provision of those Acts abrogates any of the basic elements of the constitutional structure or denudes them of their identity will have to be examined when the validity of those Act comes up for consideration.

609. The petitions are remitted to the Constitution Bench to be decided in accordance with this judgment and the law. The Constitution Bench will also decide the validity of the 26th Amendment in the light of our judgment.

Hegde and Mukherjea, JJ.—In these writ petitions questions of great constitutional importance have arisen for consideration. Herein we are called upon to decide the constitutional validity of the 24th, 25th, 26th and 29th Amendments to the Constitution. We have had the advantage of hearing long and illuminating arguments covering over 65 working days. We have been referred to numerous decisions of this Court and of the courts in England, United States, Canada, Australia, Germany, Ireland and Ceylon. Our attention has also been invited to various writings of jurists, present and past, of several countries. For paucity of time, we have not taken up the question of the validity of the 26th Amendment. That question can be conveniently considered later after this bench decides certain fundamental questions of law arising for decision. For the same reason we have also refrained from going into the merits of various writ petitions at this stage. At present we are merely deciding the scope and validity of the 24th, 25th and 29th Amendments to the Constitution.

611. In order to decide the validity of the Amendments referred to earlier, it is necessary to go into the scope of the power conferred on Parliament under Article 368 of the Constitution as it stood prior to its amendment by the 24th Amendment Act which came into force on November 5, 1971. Article 368 is the only article found in Part XX of the Constitution. The title of that part is "Amendment of the Constitution". Its marginal note as it originally stood read "Procedure for amendment of the Constitution". The Article read thus:

> "An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in—
>
> (*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or
>
> (*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (*c*) any of the Lists in the Seventh Schedule, or
>
> (*d*) the representation of States in Parliament, or
>
> (*e*) the provisions of this article,
>
> the amendment shall also require to be ratified by the Legislatures of not less than one half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

612. The petitioners' learned Counsel, Mr. Palkhivala, advanced two-fold arguments as to the scope of that Article. His first contention was that in the exercise of its powers under Article 368 as it stood before its amendment, it was impermissible for Parliament to take away or abridge any of the rights conferred by Part III of the Constitution. His second and more comprehensive argument was that the power conferred on the Parliament under Article 368 did not permit it to damage or destroy any of the basic or fundamental features or essential elements of the Constitution. The arguments on these two aspects naturally ran into each other. But for a proper legal approach, it is necessary to keep them apart as far as possible. Hence while considering the correctness of the first contention, we shall not take into consideration the importance of the Fundamental Rights. On this aspect, our approach to Article 368 will be purely based on the language of Article 368 and Article 13. The importance or transcendental character of the Fundamental Rights as well as the implied or inherent limitations on the amending power, if any, will be considered while dealing with the second of the two alternative contentions advanced by Mr. Pakhivala.

613. We shall first take up the question whether by the exercise of the power of amendment conferred by Article 368, as it originally stood, Parliament could have taken away any of the Fundamental Rights conferred by Part III. According to Mr. Palkhivala, Article 368 as it stood before its amendment merely laid down the procedure for amendment; the power to amend the Constitution must be found somewhere else in the Constitution; the power to be exercised by Parliament under Article 368 is Legislative in character and the resulting product in 'law'; hence such a law, in view of Article 13(2) which says "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void", cannot validly take away or abridge any of the Fundamental Rights. He further contended that the word 'law' in Article 13(1) means and includes not merely Legislative enactments but also canstitutional measures. The Counsel urged, there is no reason why a different meaning should be given to the word 'law' in Article 13(2). A more important argument of his was that the power to amend the Constitution, even if, it is assumed to be contained in Article 368, is by no means an exclusive power because in certain respects and subject to certain conditions, the Constitution can also be amended by Parliament by a simple majority by enacting a law in the same manner as other Legislative measures are enacted. In this connection he drew our attention to Articles 4, 169, Paragraph 7 of the Vth Schedule and Paragraph 21 of the VIth Schedule. Counsel urged that if the amendment of the provisions of the Constitution referred to therein is considered as the exercise of constituent power and consequently such an amendment is not a "law" within the meaning of that expression in Article 13, then Parliament by a simple majority of the members present and voting (if the rule regarding the quorum is satisfied) can take away or abridge any of the Fundamental Rights of certain sections of the public in this country.

614. On the other hand, the learned Attorney-General, the learned Advocate-General for the State of Maharashtra, appearing for the State of Kerala and the other Counsel appearing for the various States contended that a plain reading of Article 368 shows that the power to amend the Constitution as well as the procedure of amendment are both contained in the Article; once the form and the manner laid down in that Article have been complied with, the result is the amendment of the Constitution. According to them, the expression "an amendment of this Constitution" in Article 368 means an amendment of each and every provision or part of the Constitution; once the form and manner provided in Article 368 have been complied with, the amended Article is as effective as the original Article itself; and, therefore, as in the case of the original Article, the validity of the amended Article also cannot be challenged. They further contended that 'law' in Article 13 means only legislative enactments or ordinances, or orders or bye-laws or rules or regulations or notifications or customs or usages having the force of law in the territory of India and that expression does not include a constitutional law, though in a comprehensive sense, a constitutional law is also a law. They further contended that the word 'law' in Article 13 must be harmoniously construed with Article 368 and, if it is so construed, there is no room for doubt that the expression 'law' in Article 13 does not include a constitutional law. They repudiated the contention of Mr. Palkhivala that there was any constitutional law as such in force when the Constitution came into force. Hence according to them the expression 'law' in Article 13(2) does not take in the amendment of the

Constitution. According to them, laws enacted under Article 4, Article 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI are not to be deemed as amendments to the Constitution as is laid down in those provisions, though in fact they do amend the Constitution in certain respects and they are no different from the other legislative measures enacted by Parliament; hence the laws enacted under those provisions cannot take away or abridge any of the Fundamental Rights. We have now to see which one of these lines of reasoning is acceptable.

615. The question whether Fundamental Rights can be abridged by Parliament by the exercise of its power under Article 368 in accordance with the procedure laid down therein came up for consideration before this Court very soon after the Constitution came into force. The validity of the Constitution (1st Amendment) Act, 1951, came up for the consideration of this Court in *Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*.[69] In that case the scope of Article 368 vis-a-vis Article 13(2) was debated. This Court rejecting the contention of the petitioners therein that it was impermissible for Parliament to abridge any of the Fundamental Rights under Article 368, held that "although 'law' must ordinarily include constitutional law, there is a clear demarcation between ordinary law which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power". This Court held that "in the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13(2) does not affect the amendments made under Article 368". In that case this Court also opined that the power to amend to Constitution was explicitly conferred on Parliament by Article 368 and the requirement of a different majority was merely procedural. It rejected the contention that Article 368 is a complete code by itself and upheld the contention of the Government that while acting under Article 368, Parliament can adopt the procedures to be adopted, except to the extent provided in Article 368, in enacting other legislative measures.

616. The power of Parliament to abridge Fundamental Rights under Article 368 was again considered by this Court in *Sajjan Singh* v. *State of Rajasthan*.[70] In that case two questions were considered viz.: Whether the amendment of the Constitution in so far as it purported to take away or abridge the rights conferred by Part III of the Constitution was within the prohibition of Article 13(2) and (2) Whether Articles 31-A and 31-B (as amended by the 17th Amendment Act) sought to make changes in Article 132, Article 136 and Article 226 or any of the lists in the VIIth Schedule and therefore the conditions prescribed in the proviso to Article 368 had to be satisfied. It is clear from the judgment of the Court that the first question was not debated before the Court though the majority judges as well as the minority judges did consider that question evidently without any assistance from the bar. On both those questions Chief Justice Gajendragadkar, speaking for himself and Wanchoo and Raghubar Dayal, JJ., concurred with the view taken by this Court in *Sankari Prasad's case* (supra). But Hidayatullah, J, (as he then was) and Mudholkar, J. doubted the correctness of that decision on the first question but concurred with the view taken by the majority of judges on the second question. Hidayatullah and Mudholkar, JJ. agreed in dismissing the writ petitions as the petitioners had not challenged the correctness of the decision of this Court in *Sankari Prasad's case* (supra) on the first question.

---

[69] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[70] (1965) 1 SCR 933: AIR 1965 SC 845: (1965) 1 SCJ 377.

617. The question whether any of the Fundamental Rights can be abridged or taken away by Parliament in exercise of its power under Article 368 again came up for consideration before this Court in *I. C. Golaknath and Others* v. *State of Punjab*.[71] This case was heard by a full Court of eleven judges. In that case by a majority of six to five this Court came to the conclusion that *Sankari Prasad's case* (supra) as well *Sajjan Singh's case* (supra) were not correctly decided. The majority held that the expression 'law' in Article 13(2) includes constitutional amendments as well. The minority agreeing with the earlier decisions held that the expression 'law' in Article 13(2) does not include constitutional amendments. Five of the majority judges namely Subba Rao, C. J., Shah, Sikri, Shelat and Vaidialingam, JJ., held that Article 368 in terms only prescribes the various steps in the matter of amendment and that the Article assumes the existence of the power to amend somewhere else in the Constitution. According to them the mere completion of the procedural steps mentioned in Article 368 cannot bring about a valid amendment of the Constitution. In their opinion, the power to amend cannot be implied from Article 368. They declined to infer such a power by implication in Article 368 as they thought it was not necessary since Parliament has under Article 248 read with Item 97 of List I of the VIIth Schedule plenary power to make any law including the law to amend the Constitution subject to the limitations contained therein. They observed that the power of Parliament to amend the Constitution may be derived from Article 245, Article 246 and Article 248 read with Item 97 of List I. The remaining six judges held that the power of amendment is not derived from Article 248 read with Entry 97 of List I of the VIIth Schedule. Wanchoo, J. (as he then was) and Bhargava, Mitter and Bachawat, JJ., held that the power to amend is to be found in Article 368 and Ramaswami, J., held that Article 368 confers on Parliament the right (power) to amend the Constitution. Hidayatullah, J. (as he then was) held that Article 368 outlines a process, which, if followed strictly, results in the amendment of the Constitution; that article gives the power to no particular person or persons, and that the powers of amendment, if it can be called a power at all, is a legislative power but it is *sui generis* and exists outside the three lists in Schedule VII of the Constitution. This reasoning of Hidayatullah, J., may be reasonably read to suggest that the power of amendment is necessarily implied in Article 368. The majority of the judges who held that it was impermissible for Parliament to take away or abridge any of the Fundamental Rights by an amendment of the Constitution did not proceed to strike down the 1st, 4th and 17th Amendments. Five of them relied on the doctrine of "Prospective Overruling" (Subba Rao, C. J., Shah, Sikri, Shelat and Vaidialingam, JJ.) and Hidayatullah, J. relied on the doctrine of acquiescence to save those amedments. Evidently in an attempt to get over the effect of the decision in *Golak Nath's case* (supra), Parliament has enacted the 24th Amendment Act, 1971, and the same has been ratified by more than one half of the Legislatures of the States.

618. Now, turning back to the contentions advanced on behalf of the parties, we shall first deal with the contention of the Union and some of the States that once the "form and manner" prescribed in Article 368 are complied with, the Constitution stands amended and thereafter the validity of the amendment is not open to challenge. This contention does not appear to be a tenable one. Before a Constitution can be validly amended, two requirements must be satisfied. Firstly, there must be the power to amend the provision sought to be amended, and secondly the "form and the manner" prescribed in Article 368 must be satisfied. If the power to amend the Article is wanting, the fact that Parliament has adhered to the form and manner prescribed in Article 368 becomes immaterial. Hence the primary question is whether Parliament has power to abridge or take away any of the Fundamental Rights prescribed in Part III of the Constitution?

---

[71] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

619. In order to find out whether Parliament has the power to take away or abridge any of the Fundamental Rights in exercise of its power under Article 368, we must first ascertain the true scope of that Article. As seen earlier in *Sankari Prasad's case* (supra), this Court ruled that the power to amend the Constitution is to be found in Article 368. The same view was taken by the majority of judges in *Sajjan Singh's case* (supra) as well as in *Golok Nath's case* (supra). We respectfully hold that view to be the correct view. As mentioned earlier, Part XX of the Constitution which purports to deal with amendment of the Constitution contains only one article, i.e , Article 368. The title of that Part is "Amendment of the Constitution". The fact that a separate part of the Constitution is reserved for the amendment of the Constitution is a circumstance of great significance —see *Don John Francis Douglas Liyanage and Others v. The Queen,*[72] and *State of U. P.* v. *Manbodhan Lal Srivastava.*[73] The provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution. All modern Constitutions assign an important place to the amending provisions. It is difficult to accept the view expressed by Subba Rao, C. J., and the learned judges who agreed with him that the power to amend the Constitution is not to be found even by necessary implication in Article 368 but must be found elsewhere. In their undoubtedly difficult task of finding out that power elsewhere they had to fall back on Entry 97 of List I, Lists I to III of the VIIth Schedule of the Constitution merely divide the topics of legislation among the Union and the States. It is obvious that these lists have been very carefully prepared. They are by and large exhaustive. Entry 97 in List I was included to meet some unexpected and unforseen contingencies. It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution and debated that question for several days, would have left this important power hidden in Entry 97 of List I, leaving it to the off chance of the courts locating that power in that Entry. We are unable to agree with those learned judges when they sought to place reliance on Article 245, Article 246 and Article 248 Entry 97 of List I for the purpose of locating the power of amendment in the residuary power conferred on the Union. Their reasoning in that regard fails to give due weight to the fact that the exercise of the power under those articles is "subject to the provisions of this Constitution". Hardly few amendments to the Constitution can be made subject to the existing provisions of the Constitution. Most amendments of the Constitution must necessarily impinge on one or the other of the existing provisions of the Constitution. We have no doubt in our minds that Article 245 to Article 248 as well as the Lists in the VII Schedule merely deal with the legislative power and not with the amending power.

620. Now coming back to Article 368, it may be noted that it has three components: firstly, it deals with the amendment of the Constitution, secondly, it designates the body or bodies which can amend the Constitution, and lastly, it prescribes the form and the manner in which the amendment of the Constitution can be effected. The Article does not expressly confer power to amend; the power is necessarily implied in the Article. The Article makes it clear that the amendment of the Constitution can only be made by Parliament but in cases falling under the proviso, ratification by Legislatures of not less than one-half of the States is also necessary. That Article stipulates various things. To start with, the amendment to the Constitution must be initiated only by the introduction of a Bill for that purpose in either House of Parliament. It must then be passed in each House by a majority of the total membership of that Houses and by a majority of not less than two-thirds of the members of that House present and voting and if the amendment seeks to make any change in the provisions mentioned in the proviso, it must be ratified by not less than one-half of the State Legislatures. Thereafter, it should be presented to the President for his assent. It further says that upon such assent being given to the Bill "the Constitution shall stand amended in accordance with terms of the Bill". To restate the position, Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution. No undue importance should be attached to the marginal note which says "Procedure for amendment of the Constitution". Marginal note plays a very little part in the construction of a statutory provision. It should have much less importance in construing a constitutional Provision. The language of Article 368 to our mind is plain and unambiguous. Hence we need not call into aid any of the rules of construction about which there was great deal of debate at the hearing. As the power to amend under the Article as it originally stood was only implied, the marginal note rightly referred to the procedure of amendment. The reference to the procedure in the marginal note does not negative the existence of the power implied in the Article.

---

[72] (1967) 1 AC 259 at 287.

[73] 1958 SCR 533 at 544: AIR 1957 SC 912 : 1958 SCJ 150.

621. The next question is whether the power conferred under Article 368 is available for amending each and every provision of the Constitution. The Article opens by saying "An amendment of this Constitution" which means an amendment of each and every provision and part of the Constitution. We find nothing in that Article to restrict its scope. If we read Article 368 by itself, there can be no doubt that the power of amendment implied in that Article can reach each and every Article as well as every part of the Constitution.

622. Having ascertained the true scope of Article 368, let us now turn to Article 13. A great deal of reliance was placed by the learned Counsel for the petitioners on the expression 'law' found in Article 13(1) and (2). As seen earlier, the two judges in *Sajjan Singh's case* (supra), as well as the majority of judges in *Golak Nath's case* (supra), opined that 'law' in Article 13(2) also includes constitutional law, i. e , law which amends the Constitution and we see no substance in the contention that the amendment of a Constitution is not 'law'. The Constitution is amended by enacting Amendment Acts. The Constitution is not only a law but the paramount law of the country. An amendment of that law must necessarily be a law. The fact that the word 'law' is not used in Article 368 is of little significance. For that matter Article 110 also does not provide that a Bill when assented to by the President becomes law. The amendment of a Constitution is initiated by a Bill and it goes through the procedure laid down in Article 368, supplemented wherever necessary by the procedure prescribed in Article 107:

see *Sankari Prasad's case* (supra). The Bill when passed by both the Houses of Parliament and, in matters coming under the proviso to Article 368, after securing the necessary ratification by the State Legislatures, is presented to the President for his assent. The procedure adopted is the same as that adopted in enacting an ordinary statute except to the extent provided in Article 368. Even if it had been different, there can be hardly any doubt that the amendment of a Constitution is 'law'. In *Sankari Prasad's case* (supra), Patanjali Sastri, J. (as he then was) speaking for the Court had no doubt in ruling that the expression 'law' must ordinarily included 'constitutional law'. The same view was taken by all the judges in *Sajjan Singh's case* (supra), and also by most of the judges in *Golak Nath's case* (supra).

623. But the question still remains whether our Constitution-makers by using the expression 'law' in Article 13(2) intended that that expression should also include the exercise of Parliament's amending power under Article 368. We have earlier explained the scope and extend of Article 368. In understanding the meaning of the word 'law' in Article 13(2) we should bear in mind the scope of Article 368. The two Articles will have to be construed harmoniously. The expression 'law' may mean one of two things, namely, either those measures which are enumerated in Article 13(3) as well as statutes passed by Legislatures or in addition thereto constitutional laws (amendments) as well. In this connection reference may be made to a passage in *Corpus Juris Secundum* (Vol. XVI—Title Constitutional law, Article 1, p. 20), which says:

> "The term 'Constitution' is ordinarily employed to designate the organic law in contradistinction to the terms 'law' which is generally used to designate statutes or legislative enactments. Accordingly, the term 'law' under this distinction does not include a constitutional amendment. However, the term 'law' may in accordance with the context in which it is used, comprehend or include the Constitution or a constitutional provision or amendment."

624. It is true that Article 13(3) contains an inclusive definition of the term 'law' and, therefore, the question whether it includes constitutional amendment also cannot be answered with reference to that clause. All the same, since the expression 'law' can have two meanings, as mentioned earlier, we must take that meaning which harmonises with Article 368. As mentioned earlier, Article 368 is unambiguous, whereas Article 13 is ambiguous because of the fact that the word 'law' may or may not include constitutional amendment. Further, when we speak of 'law' we ordinarily refer to the exercise of legislative power. Hence, 'law' in Article 13(2) must be construed as referring to the exercise of an ordinary legislative power.

625. An examination of the various provisions of our Constitution shows that it has made a distinction between "the Constitution" and "the laws". The two are invariably treated separately—see Articles 60, 61, proviso to Article 73(1), Article 75(4) read with the Third Schedule, Article 76(2) and Article 124(6) read with the Third Schedule, Article 148(5); Article 159 and Article 219 read with the Third Schedule. These provisions clearly establish that the Constitution-makers have not used the expression 'law' in the Constitution as including constitutional law.

626. Mr. Palkhivala contended that the term 'law' in Article 13(1) includes constitutional law also. Wanchoo, J., speaking for himself and on behalf of two other judges in *Golak Nath's case* (supra) held that on the day the Constitution came into force, no constitutional law was in force. Therefore, in his view, the term 'law' in Article 13(1) can only refer to legislative measures or ordinances or bye-laws, rules, regulations, notifications, customs and usages. Mr. Palkhivala contended that the said finding is not correct. In that connection he referred to the treaties and agreements entered into between the former Rulers of the Indian States and the Central Government as well as to certain other measures which were in force when the Constitution came into force which, according to him, are 'constitutional laws' and, on that basis, he contended that certain constitutional laws were in force on the day when the Constitution came into force. We are not satisfied that this contention is correct. Under Article 395, the Indian Independence Act, 1947, as well as the Government of India Act, 1935, were repealed. The laws which were continued under Article 372 after the Constitution came into force did not operate on their own strength. For their validity they had to depend on Article 372 and that Article made it clear that those laws will continue to be in force "subject to the other provisions of the Constitution". Anyway it is not necessary to decide the question whether those laws are constitutional laws. Article 13(1) does not refer to 'laws' as such. It refers to "laws in force in the territory of India immediately before the commencement of this Constitution". It identifies certain laws and determines the extent of their validity. The scope of Article 13(1) does not bear on the interpretation of the expression 'law' in Article 13(2).

627. We shall now examine the contention of Mr. Palkhivala based on Articles 4 and 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. He contended—and we have no doubt that he did so rightly—that the Constitution can be amended not only under Article 368 but also under Articles 4 and 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. Amendments under these provisions can be effected by Parliament by a simple majority vote of the members present in the House and voting, if the prescribed quorum is there. If the two Houses do not agree on any amendment under those provisions, the same has to be decided by a joint sitting of the two Houses as provided in Article 108. That is because of the express exclusion of the application of Article 368 to the amendments made under those provisions. According to Mr. Palkhivala, by the exercise of its power under the aforementioned provisions, Parliament can in certain respects take way or abridge the Fundamental Rights of a section of the people of this country. He painted a gloomy picture as to what can happen by the exercise of power by Parliament under those provisions. It is true that the power conferred under the aforementioned provisions is amending power but those provisions make it clear that the exercise of the power under those provisions shall not be "deemed to be the amendment of the Constitution for the purpose of Article 368".

628. This brings up to a consideration, what exactly is the intent of the expression "No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purpose of Article 368". There can be little doubt that these words merely mean that the form and manner prescribed in Article 368 need not be complied with. Once this position is accepted, any law made under those provisions takes the character of an ordinary law and that law becomes subject to the other provisions of the Constitution including Article 13(2).

629. Counsel on either side took us through the debates of the Constituent Assembly relating to Article 368. Naturally each one of them relied on those passages from the speeches of the various members who took part in the debate and, in particular, on the speeches of late Prime Minister

Nehru and the then Law Minister Dr. Ambedkar, which supported their contention. Having gone through those speeches, we feel convinced that no conclusive inference can be drawn from those speeches as to the intention of those speakers. Hence, we need not go into the question at this stage whether it is permissible for us to place reliance on those speeches for finding out the true scope of Article 368.

630. Mr. Palkhivala placed a great deal of reliance on the stages through which the present Article 13 passed. It is seen from the Constituent Assembly records that when the Constituent Assembly was considering the provision which resulted in Article 13(2), Mr. Santhanam one of the members of the Constituent Assembly moved an amendment to make it clear that the expression 'law' in Article 13(2) does not include an amendment of the Constitution under draft Article 304 (present Article 368) and that the amendment was accepted by Sardar Patel, Chairman of the Advisory Committee. On the basis of that decision, Sir B. N. Rau, the Constitutional Adviser redrafted the concerned provision by specifically excluding from its operation amendments of the Constitution. When this matter went before the Drafting Committee consisting of eminent lawyers, they redrafted the clause thus:

> "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of contravention be void."

631. In other words, the drafting committee deleted from Sir B. N. Rau's draft those words which specifically excluded from the operation of the clause amendments of the Constitution. From these circumstances, Mr. Palkhivala seeks to draw the inference that the Constituent Assembly finally decided to bring within the scope of Article 13(2) constitutional amendments also. We are unable to accept this contention. It is not clear why the drafting committee deleted the reference to the amendment of the Constitution in Article 13(2). It is possible that they were of the opinion that in view of the plain language of the provision relating to the amendment of the Constitution, i.e. draft Article 304, it was unnecessary to provide in Article 13 (2) that the amendment of the Constitution does not come within its scope.

632. It is true that this Court has characterised the Fundamental rights as "paramount" in *A. K. Gopalan* v. *State of Madras*,[74] as "sacro-sanct" in *State of Madras* v. *Smt. Champakam Dorairajan*,[75] as "rights reserved by the people" in *Pandit M. S. M. Sharma* v. *Shri Srikrishna Sinha*,[76] as "inalienable and inviolable" in *Smt. Ujjam Bhai* v. *State of U. P.*,[77] and as transcendental" in several other cases. In so describing the Fundamental Rights in those cases, this Court could not have intended to say that the Fundamental Rights alone are the basic elements or fundamental features of the Constitution. Mr. Palkhivala conceded that the basic elements and fundamental features of the Constitution are found not merely in Part III of the Constitution but they are spread out in various other parts of the Constitution. They are also found in some of the Directive Principles set out in Part IV of the Constitution and in the provisions relating to the sovereignty of the country, the Republican and the Democratic character of the Constitution. According to the Counsel, even the provisions relating to the unity of the country are basic elements of the Constitution.

---

[74] 1950 SCR 88 at 198: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

[75] 1951 SCR 525: AIR 1951 SC 226: 1951 SCJ 313.

[76] 1959 Supp 1 SCR 806: AIR 1959 SC 395: 1959 SCJ 925.

[77] (1963) 1 SCR 778: AIR 1962 SC 1621.

633. It was urged that since even amendment of several provisions of minor significance requires the concurrence of the Legislatures of the majority of the States it is not likely that the Constitution-makers would have made the amendment of the provisions relating to Fundamental Rights a plaything of the Parliament. This argument, however, does not lead to any definite conclusion. It is not unlikely that the Constitution-makers thought that the states are specially interested in the provisions mentioned in the proviso to Article 368, so that the amendment of those provisions should require ratification by the Legislatures of the majority of the States. When the language of Article 368 is plain, as we think it is no question of construction of that Article arises. There is no need to delve into the intention of the Constitution-makers.

634. Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a straight jacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to come. Hence every Constitution wisely drawn up provides for its own amendment. We shall separately consider the contention of Mr. Palkhivala that our Constitution embodies certain features which are so basic that no free and civilised society can afford to discard them and in no foreseeable future can those features become irrelevant in this country. For the present we shall keep apart, for later consideration. Mr. Palkhivala's contention that the Parliament which is only a constituted body cannot damage or destroy the essential features of the Constitution. Uptil now we have merely confined our attention to the question as to the scope and reach of Article 368. This Court has always attached great importance to the Fundamental Rights guaranteed under our Constitution. It has given no less importance to some of the Directive Principles set out in Part IV. The Directive Principles embodied in Part IV of the Constitution or at any rate most of them are as important as the rights of individuals. To quote the words of Granville Austin. (*The Indian Constitution—Corner Stone of a Nation*, page 50) :

> "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement yet despite the permeation of the entire Constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and the Directive Principles of State Policy. These are the conscience of the Constitution."

Therefore to implement the duties imposed on the State under Part IV, it may be necessary to abridge in certain respects the rights conferred on the citizens or individuals under Part III, as in the case of incorporation of Clause 4 in Article 15 to benefit the backward classes and Scheduled Castes and Scheduled Tribes and the amendment of Article 19(2) with a view to maintain effectively public order and friendly relations with foreign States. Hence we are unable to construe the amending power in a narrow or pedantic manner. That power, under any circumstance, must receive a broad and liberal interpretation. How large it should be is a question that requires closer examination. Both on principle as well as on the language of Article 368, we are unable to accede to the contention that no right guaranteed by Part III can be abridged.

635. This Court is always reluctant to overrule its earlier decisions. There must be compelling reasons for overruling an earlier decision of this Court. As seen earlier, there are already conflicting decisions as to the scope of Article 368. As far back as 1951, in *Sankari Prasad's case* (supra), this Court took the view that the power of amendment conferred under Article 368 included within itself the power to abridge and take away the Fundamental Rights incorporated in Part III of the Constitution. The correctness of that view was not challenged in several other decisions. The same view was taken in *Sajjan Singh's case* (supra). That view was negatives in *Golaknath's case* (supra), by a very narrow majority. Bearing in mind the disastrous effect that decision would have had on many important laws that had been enacted by the Union and the States between the years 1951 to 1967, this Court by relying on the doctrine of prospective overruling and the doctrine of acquiescence did not invalidate those laws.

636. One other circumstance of great significance is that the 1st Amendment to the Constitution was carried out by the provisional Parliament which consisted of the very members who were the members of the Constituent Assembly. It should be remembered that members of the Constituent Assembly continued as the members of the provisional Parliament till the General Election in 1952. They must have been aware of the intention with which Article 368 was enacted. These are important circumstances. The interpretation we place on a constitutional provision, particularly on a provision of such great importance as Article 368 must subserve national interest. It must be such as to further the objectives intended to be achieved by the Constitution and to effectuate the philosophy underlying it. To quote the memorable words of Chief Justice Marshall we must not forget that we are expounding a Constitution.

637. We now come to the second contention of Mr. Palkhivala that the word 'amendment' has a limited meaning and Article 368 does not permit any damage to or destruction of the basic or fundamental features or essential elements of the Constitution. Mr. Palkhivala urged that the word "amendment" or "amend" ordinarily means "to make certain changes or effect some improvements in a text". Those words do not, according to him, except under special circumstances mean the widest power to make any and every change in a document, including a power to abrogate or repeal the basic features of that document. The same, he contended, is ture of a power to amend a statute or a Constitution, in support of his contention he invited our attention to the various meanings given to the word "amendment" or "amend" in several dictionaries. He further urged that in construing the meaning of the word "amendment" in Article 368, we must take into consideration the donee to whom the power to amend the Constitution is granted, the atmosphere in which the Constitution came to be enacted, the consequences of holding that power is unlimited in scope as well as the scheme of the Constitution. He urged that in the final analysis, the duty of the Court is to find out the true intention of the founding fathers and therefore the question before us is whether the founding fathers intended to confer on Parliament, a body constituted under the Constitution, power to damage or destroy the very basis on which our Constitution was erected. On the other hand it was contended on behalf of the Union of India, State of Kerala as well as the other States that the power of amendment conferred under Article 368 is of the widest amplitude. It brooks no limitation. It is a power which can be used to preserve the Constitution, to destroy the Constitution and to re-create a new Constitution. It was contended that the society can never be static, social ideals and political and economic theories go on changing and every Constitution in order to preserve itself needs to be changed now and then to keep in line with the growth of the society. It was further contended that no generation can impose its will permanently on the future generations. Wise as our founding fathers were, wisdom was not their sole monopoly. They themselves realised it. They knew that in a changing world, there can be nothing permanent and, therefore, in order to atune the Constitution to the changing concepts of politics, economics and social ideas, they provided in Article 368 a machinery which is neither too flexible nor too rigid and makes it possible to so reshape the Constitution as to meet the requirements of the time. According to them by following the form and manner prescribed in Article 368, Parliament can exercise the same power which the Constituent Assembly could have exercised. We have now to consider which one of the two contentions is acceptable.

638. While interpreting a provision in a statute or Constitution the primary duty of the court is to find out the legislative intent. In the present case our duty is to find out the intention of the founding fathers in enacting Article 368. Ordinarily the legislative intent is gathered from the language used. If the language employed is plain and unambiguous, the same must be given effect to irrespective of the consequences that may arise. But if the language employed is reasonably capable of more meanings than one, then the Court will have to call into aid various well settled rules of construction and, in particular, the history of the legislation—to find out the evil that was sought to be remedied and also in some cases the underlying purpose of the legislation—the legislative scheme and the consequences that may possibly flow from accepting one or the other of the interpretations because no legislative body is presumed to confer a power which is capable of misuse.

639. It was conceded at the bar that generally speaking, the word "amendment" like most words in English or for that matter if any language, has no precise meaning. Unlike "sale" or "excise", it is not a term of law. It is capable of receiving a wide meaning as well as a narrow meaning. The power to amend a Constitution in certain contexts may include even a power to abrogate or repeal that Constitution. It may under certain circumstances mean a power to effect changes within narrow limits. It may sometimes mean a power that is quite large but yet subject to certain limitations. To put it shortly, the word "amendment" without more, is a colourless word. It has no precise meaning. It takes its colour from the context in which it is used. It cannot be interpreted in vacuo. Few words in English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of the context. As observed by Holmes, J., in *Towne* v. *Eisner*,[78] "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to circumstances and the time in which it is used". We must read the word "amendment" in Article 368 not in isolation but as occuring in a single complex instrument. Article 368 is a part of the Constitution. The Constitution confers various powers on Legislatures as well as on other authorities. It also imposes duties on those authorities. The power conferred under Article 368 is only one such power. Unless it is plain from the constitutional scheme that the power conferred under Article 368 is a super power and is capable of destroying all other powers, as contended on behalf of the Union and the states, the various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368.

---

[78] 245 US 418 Wt 425.

640. In our Constitution unlike in the Constitution of the United States of America the words "amendment" and "amend" have been used to convey different meanings in different places In some Articles they are used to confer a narrow power, a power merely to effect changes within prescribed limits—see Articles 4, 107(2), 111, 169(2), 196(2), 197(2) and 200. Under Paragraph 7 of the Fifth Schedule as well as Paragraph 21 of the Sixth Schedule to the Constitution, a much larger power to amend those Schedules has been conferred on Parliament. That power includes power to amend "bay way of addition, variation or repeal". Similar is the position under the repealed Article 243(2), Articles 252(2) and 350(5). It is true that the power to amend conferred under the Fifth and Sixth Schedules is merely a power to amend those Schedules but if the Constitution-makers were of the opinion that the word "amendment" or "amend" included within its scope, unless limited otherwise, a power to add, vary, or repeal, there was no purpose in mentioning in those Articles or parts "amend by way of addition, variation or repeal". In this connection it may also be remembered that the Constituent Assembly amended Section 291 of the Government of India Act, 1935 of August 21, 1949, just a few days before it approved Article 368, i.e. on September 17, 1949. The amended Section 291 empowered the Governor-General to amend certain provisions of the 1935 Act "by way of addition, modification or repeal". From these circumstances, there is prima facie reasan to believe that our Constitution-makers made a distinction between a mere power to amend and a power to amend by way of "addition, modification or repeal". It is one of the accepted rules of construction that the courts should presume that ordinarily the Legislature uses the same words in a statute to convey the same meaning. If different words are used in the same statute, it is reasonable to assume that, unless the context otherwise indicates, the Legislature intended to convey different meanings of those words. This rule of interpretation is applicable in construing a Constitution as well.

641. Now that we have come to the conclusion that the word "amendment" in Article 368 is not a word of precise import and has not been used in the verious Articles and parts of the Constitution to convey always the same precise meaning, it is necessary to take the aid of the other relevant rules of construction to find out the intention of the Constitution-makers.

642. The question whether there is any implied limitation on the amending power under Article 368 has not been decided by this Court till now. That question did not come up for consideration in *Sankari Prasad's case* (supra). In *Sajjan Singh's case* (supra), neither the majority speaking through Gajendragadkar, C. J. nor Hidayatullah, J. (as he then was) went into that question. But Madholkar, J., did foresee the importance of that aspect. He observed in the course of his judgment:

> "We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the Union executive responsible to Parliament and the State executive to the State Legislatures, erected a federal structure and distributed legislative power between Parliament

SCC Online

and the State Legislatures; recognised certain rights as fundamental and provided for their enforcement, prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union Judiciary and of the higher judiciary in the States, to uphold the Constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?"

643. For the first time in *Golak Nath's case* (supra), the contention that the power of amendment under Article 368 is subject to certain inherent and implied limitations was urged. Subba Rao, C. J. speaking for himself and four of his colleagues, while recognising the force of that contention refrained from pronouncing on the same. Wanchoo, J. (as he then was) speaking for himself and two other judges opined that the power under Article 368 is a very wide power but it may not include a power to abrogate the Constitution. He did explain what he meant by "abrogate the Constitution". Hidayatullah, J. (as he then was) did not address himself to that question. Bachawat, J, side-stepped that question by saying that the impugned amendments did not destroy any basic feature of the Constitution. The only judge who rejected the contention that there are inherent or implied limitations on the amending power was Ramaswami, J. From the above discussion it is seen that in cases that came up for consideration before this Court in the past, several judges did consider the possibility of having some limitation on the amending power under Article 368 though they did not definitely pronounce on that question.

644. One of the well-recognised rules of construction is the rule laid down in *Heydon's case* (supra). What was the mischief that the Constitution-makers intended to remedy? What was the purpose intended to be achieved by the Constitution? To answer this question it is necessary to make a brief survey of our Nationalist movement ever since 1885 and the objectives sought to be achieved by that movement.

645 The objectives underlying our Constitution began to take their shape as a result of the forces that operated in the national struggle during the British rule when the British resorted to arbitrary acts of oppression such as brutal assaults on unarmed satyagrahis, internments, deportations, detention without trial and muzzling of the press. The harshness with which the executive operated its repressive measures strengthened the demand for constitutional guarantees of Fundamental Rights. As far back as 1895, the Constitution of India Bill, prepared by some eminent Indians, envisages for India a Constitution guaranteeing to everyone of our citizens freedom of expression, inviolability of one's house, right to property, equality before the law, equal opportunity of admission to public offices, right to present claims, petitions and complaints and right to personal liberty. After the publication of the Montague-Chelmsford Report, the Indian National Congress at its special session held in Bombay in August, 1918, demanded that the new Government of India Act should contain "Declaration of Rights of the people of India as British citizens". The proposed declaration was to embody among other things, guarantees in regard to equality before the law, protection in respect of life and liberty, freedom of speech and press and right of association. In its Delhi Session in December of the same year, the Congress passed another resolution demanding the immediate repeal of all laws, regulations and ordinances restricting the free discussion of political questions and conferring on the executive the power to arrest, detain, intern, extern or imprison any British subject in India outside the process of ordinary Civil or Criminal Law and the assimilation of the law of sedition to that of England. The Commonwealth of India Bill, finalised by the National Convention in 1926 embodied a specific declaration of rights visualising for every person certain rights in terms practically identical with the relevant provisions of the Irish Constitution. The problems of minorities in India further strenghtened the general argument in favour of inclusion of Fundamental Rights in the Indian Constitution. In its Madras Session in 1927, the Indian National Congress firmly laid down that the basis of the future Constitution must be a declaration of Fundamental Rights. In 1928, the Nehru Committee in its report incorporated a provision for enumeration of such rights, recommending their adoption as a part of the future Constitution of India. The Simon Commission rejected the demand on the plea that an abstract declaration of such rights was useless unless there existed "the will and the means to make them effective". In 1932, in its Karachi Session, the Indian National Congress retierated its resolve to regard a written guarantee of Fundamental Rights as essential in any future constitutional set up in India. The demand for the incorporation of the Fundamental Rights in the constitutional document was reiterated by the Indian leaders at the Round Table Conferences. The Joint Select Committee of the British Parliament rejected those demands. The Sapru Committee (1944-45) was of the opinion that in the peculiar circumstances of India, the Fundamental Rights were necessary not only as assurance and guarantees to the minorities but also prescribing a standard of conduct for the legislatures, Governments and the courts. The Committee felt that it was for the Constitution-making body to enumerate first the list of Fundamental Rights and then to undertake their further division into justiciable and non-justiciable rights and provide a suitable machinery for their enforcement.

646. The atrocities committed during the Second World War and the world wide agitation for human rights, the liberties guaranteed in the Atlantic Charter, the U. N. Charter and the Declaration of Human Rights by the Human Rights' Commission strengthened the demand for the incorporation of Fundamental Rights in our Constitution. The British Cabinet Mission in 1946 recognised the need for a written guarantee of Fundamental Rights in the Constitution of India. It accordingly recommended the setting up of an advisory committee for reporting, inter alia, on Fundamental Rights. By the Objectives Resolution adopted on January 22, 1947, the Constituent Assembly solemnly pledged itself to draw up for India's future governance a Constitution wherein "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality and wherein adequate safeguard would be provided for minorities, backward and tribal areas and depressed and other backward classes". The close association between political freedom and social justice has become a common concept since the French Revolution. Since the end of the First World War, it was increasingly recognised that peace in the world can be established only if it is based on social justice. The most modern Constitutions contain declaration of social and economic principles, which emphasise, among other things, the duty of the State to strive for social security and to provide work, education and proper condition of employment for its citizens. In evolving the Fundamental Rights and the Directive Principles, our founding fathers, in addition to the experience gathered by them from the events that took place in other parts of the world, also drew largely on their experience in the past. The Directive Principles and the Fundamental Rights mainly proceed on the basis of Human Rights. Representative democracies will have no meaning without economic and social justice to the common man. This is a universal experience. Freedom from foreign rule can be looked upon only as an opportunity to bring about economic and social advancement. After all freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution.

647. The Objectives Resolution passed by the Constituent Assembly in January, 1947, is a definite landmark. It is a precursor to the preamble to our Constitution. It sets out in detail the objectives that were before our Constitution-makers. Those objectives have now been incorporated in the preamble to our Constitution which reads:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India in a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all.
>
> FRATERNITY assuring the dignity of the individual and the unit of the Nation;
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949 do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

648. From the preamble it is quite clear that the two primary objectives that were before the Constituent Assembly were: (1) to constitute India into a Sovereign Democratic Republic and (2) to secure to its citizens the rights mentioned therein. Our founding fathers, at any rate, most of them had made immense sacrifices for the sake of securing those objectives. For them freedom from British rule was an essential step to render social justice to the teeming millions in this country and to secure to one and all in this country the essential human rights. Their Constitutional plan was to build a welfare state and an agalitarian society.

649. Now that we have set out the objectives intended to be achieved by our founding fathers, the question arises whether those very persons could have intended to empower the Parliament, a body constituted under the Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrified.

650. If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power granted then the Court has to take into consideration the consequences that might ensue by interpreting the same as an unlimited power. We have earlier come to the conclusion that the word "amendment" is not an expression having a precise connotation. It has more than one meaning, hence it is necessary to examine the consequence of accepting the contention of the Union and the States. Therefore let us understand the consequences of conceding the power claimed. According to the Union and the States that power inter alia, includes the power to: (1) destroy the sovereignty of this country and make this country a satellite of any other country; (2) substitute the democratic form of government by monarchical or authoritarian form of government; (3) break up the unity of this country and form various independent States; (4) destroy the secular character of this country and substitute the same by a theocratic form of government; (5) abrogate completely the various rights conferred on the citizens as well as on the minorities; (6) revoke the mandate given to the States to build a Welfare State; (7) extend the life of the two Houses of Parliament indefinitely; and (8) amend the amending power in such a way as to make the Constitution legally or at any rate practically unamendable. In fact, their contention was that the legal sovereignty, in the ultimate analysis rests only in the amending power. At one stage, Counsel for the Union and the States had grudgingly conceded that the power conferred under Article 368 cannot be used to abrogate the Constitution but later under pressure of questioning by some of us they changed their position and said that by 'abrogation' they meant repeal of the Constitution as a whole. When they were asked as to what they meant by saying that the power conferred under Article 368 cannot be used to repeal the Constitution, all that they said was that while amending the Constitution, at least one clause in the Constitution must be retained though every other clause or part of the Constitution including the preamble can be deleted and some other provisions substituted. Their submission in short was this that so long as the expression the "Constitution of India" is retained, every other article or part of it can be replaced. They tried to tone down the effect of their claim by saying that, though legally, there is no limitation on the amending power, there are bound to be political compulsions which make it impermissible for Parliament to exercise its amending power in a manner unacceptable to the people at large. The strength of political reaction is uncertain. It depends upon various factors such as the political consciousness of the people, their level of education, strength of the various political organizations in the country, the manner in which the mass media is used and finally the capacity of the government to suppress agitations. Hence the peoples' will to resist an unwanted amendment cannot be taken into consideration in interpreting the ambit of the amending power. Extra legal forces work in a different plane altogether.

651. We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely basic and circumstancial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it

SCC Online

may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. When we speak of the 'abrogation' or 'repeal' of the Constitution, we do not refer to any form but to substance. If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent with those features are incorporated, it cannot still remain the Constitution referred to in Article 368. The personality of the Constitution must remain unchanged.

652. It is also necesssary to bear in mind that the power to amend the Constitution is conferred on Parliament, a body constituted under the Constitution. The people as such are not associated with the amendment of the Constitution. From the preamble we get that it is the people of the country who conferred this Constitution on themselves. The statement in the preamble that the people of this country conferred the Constitution on themselves is not open to challenge before this Court. Its factual correctness cannot be gone into by this Court which again is a creature of the Constitution. The facts set out in the preamble have to be accepted by this Court as correct. Anyone who knows the composition of the Constitution Assembly can hardly dispute the claim of the members of that Assembly that their voice was the voice of the people. They were truly the representatives of the people, even though they had been elected under a narrow franchise. The Constitution framed by them has been accepted and worked by the people for the last 23 years and it is too late in the day now to question, as was sought to be done at one stage by the Advocate-General of Maherashtra, the fact that the people of this country gave the Constitution to themselves.

653. When a power to amend the Constitution is given to the people, its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of the either House of Parliament. That is seen from our experience in the past. That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. It provides for the protection of the minorities. If the majority opinion is taken as the guiding factor then the guarantees given to the minorities may become valueless. It is well known that the representatives of the minorities in the Constitution Assembly gave up their claim for special protection which they were demanding in the past because of the guarantee of Fundamental Rights. Therefore the contention on behalf of the Union and the States that the two-thirds of the members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable.

654. The President of India under Article 60 of the Constitution is required to take an oath before he assumes his office to the effect that he will "to the best of his ability preserve, protect and defend the Constitution". Somewhat similar oaths have to be taken by the Governors of States, Ministers at the Centre and in the States, Judges of the superior courts and other important functionaries. When the President of India is compelled to give assent to a constitutional amendment which might destroy the basic features of the Constitution, can it be said that he is true to his oath to "preserve, protect and defend the Constitution" or does his oath merely mean that he is to defend the amending power of Parliament? Can the amending power of Parliament be considered as the Constitution? The whole scheme and the structure of our Constitution proceeds on the basis that there are certain basic features which are expected to be permanent.

655. Implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by considerations arising out of what appears to be the general scheme of the statute. *In re: The Central Provinces and Berar (Central Provinces and Berar) Act No. XIV of 1938*,[79] Sir Maurice Gwyer, C. J., observed at p. 42:

> "A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

656. Lord Wright in *James* v. *Commonwealth of Australia*,[80] stated the law thus:

> "The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and in the construction must hold a balance between all its parts."

657. Several of the powers conferred under our Constitution have been held to be subject to implied limitations though those powers are expressed in general terms, or even in absolute terms. The executive power of the Union is vested in the President and he is authorised to exercise the same either directly or through officers subordinate to him in accordance with the Constitution. Under Article 75, it is the President who can appoint the Prime Minister and the Ministers are to hold office during his pleasure. Despite this conferment of power in general and absolute terms, because of the scheme of the Constitution, its underlying principles and the implications arising from the other provisions in the Constitution, this Court has held in several cases that the President is a constitutional head and the real executive power vests in the Cabinet. Similarly though plenary powers of legislation have been conferred on the Parliament and the State Legislatures in respect of the legislative topics allotted to them, yet this Court has opined that by the exercise of that power neither Parliament nor the State Legislatures can delegate to other authorites their essential legislative functions nor could they invade on the judicial power. These limitations were spelled out from the nature of the power conferred and from the scheme of the Constitution. But, it was urged on behalf of the Union and the States that, though there might be implied limitations on other powers conferred under the Constitution, there cannot be any implied limitations on the amending power. We see no basis for this distinction. The amending power is one of the powers conferred under the Constitution whatever the nature of that power might be. That part during the course of hearing the learned Solicitor-General had to concede that there are certain implied limitations on the amending power itself. The amending power of Parliament in certain respects is subject to the express limitations placed on it by the proviso to Article 368. Article 368 prescribes that if Parliament wants to amend Article 54, the Article dealing with the election of the President, the amendment in question must be ratified by the legislatures of not less than one-half of the States. No such express limitation is placed on the amending power of Parliament in respect of Article 52 which provides that there shall be a President of India. If it be held that Article 52 can be amended without complying with the requirements of the proviso in Article 368, the limitation placed on Parliament in respect of the amendment of Article 54 becomes meaningless. When this incongruity was pointed out to the learned Solicitor-General, he conceded that in view of the fact that before Article 54 can be amended, the form and the manner laid down in proviso to Article 368 has to be followed, it follows as a matter of implication that the same would be the position for the amendment of Article 52. The only other alternative inference is that Article 52 can never be amended at all. It is not necessary to go into the other implications that may arise from the language of Article 368.

---

[79] 1939 FCR 18: AIR 1939 FC 1.

[80] 1936 AC 578 at 613.

658. From what has been said above, it is clear that the amending power under Article 368 is also subject to implied limitations. The contention that a power to amend a Constitution cannot be subject to any implied limitation is negatived by the observations of the Judicial Committee in *The Bribery Commissioner* v. *Rana Singhe*.[81] The decision of the Judicial Committee in *Liyange's case* (supra) which held that Ceylon Parliament was incompetent to encroach upon the judicial power also lends support to our conclusion that there can be implied limitations on the amending power.

659. In support of the contention that there can be no implied limitations on the amending power, our attention was invited to writings of various jurists of eminence. Most of the writings relate to the amending power under Article 5 of the United States Constitution. It is true that in the United States most of the writers are of opinion that there is no implied limitation on the amending power under the United States Constitution. The Supreme Court of the United States has not specifically pronounced on this question. The only case in which the question of implied limitation on the amending power under the United States Constitution came up for consideration was *Rhode Island* v. *Palmer*.[82] In that case the Supreme Court of United States rejecting the contention that the 18th Amendment—National Prohibition Amendment—was outside the amending power under Article 5 because of implied limitations on that power, held that the Amendment was valid. The Supreme Court, however, did not discuss the question of implied limitations on the amending power as such. In fact the judgment that was rendered in that case gave no reasons. Only certain questions were formulated and answered. It is not clear from the judgment whether the particular limitation pleaded was rejected or whether the plea of implied limitation on the amending power, was rejected though writers of most text books have taken the view that the court rejected the plea of implied limitations on the amending power. It may be noted that in the United States not a single human right has been taken away or even its scope narrowed. There the controversy centres round two questions viz.:

---

[81] 1965 AC 172.

[82] 64 L Ed 946.

(1) abolition of slavery and (2) prohibition of sale and consumption of liquor. We will not be justified in expounding our Constitution on the basis of the controversies relating to those issues. Article 5 of the U. S. Constitution is not similar to Article 368 of our Constitution. In the former Article, there is an express limitation on the amending power, i.e. regarding the representation of the States in the Senate. Further the amendment under Article 5 of the United States Constitution can be proposed either by the Congress or by State Conventions. They may be ratified either by a minimum of 3/4th of the State Legislatures or by Conventions held in at least 3/4th of the States. Whether a particular amendment should be ratified by the State Legislatures or by the State Conventions is entirely left to the discretion of the Congress. As held by the United States Supreme Court, the decision of the Congress on that question is final. The Constitution-makers must have proceeded on the basis that the Congress is likely to require the amendment of basic elements or fundamental features of the Constitution to be ratified by State Conventions. The scheme of no two Constitutions is similar. Their provisions are not similar. The language employed in the amending clauses differ from Constitution to Constitution. The objectives lying behind them also are bound to differ. Each country has its own needs, its own philosophy, its own way of life and above all its own problems. Hence in our opinion, we will be clouding the issues, if we allow ourselves to be burdened either by the writings of the various writers on other Constitutions or by the decisions rendered on the basis of the provisions of the other Constitutions, though Counsel on either side spared no efforts to place before us various opinions expressed by various writers as well as the decisions rendered by several courts including the State Courts in United States of America.

660. The rule laid down by the Judicial Committee in *R.* v. *Burah*[83] that "if what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any court of Justice to inquire further, or to enlarge *constructively* those conditions and restrictions" was heavily relied on by Mr. Seervai. That decision, however, has been confined to the interpretation of conditional legislations and the rule that it laid down has not been applied while considering the question whether there are any implied limitations on any of the powers conferred under a statute or Constitution.

661. It was strenuously urged on behalf of the Union and the States that if we come to the conclusion that there are implied or inherent limitations on the amending power of Parliament under Article 368, it would be well nigh impossible for Parliament to decide before hand as to what amendments it could make and what amendments it is forbidden to make. According to the Counsel for the Union and the States, the conceptions of basic elements and fundamental features are illusive conceptions and their determination may differ from judge to judge and therefore we would be making the task of Parliament impossible if we uphold the contention that there are implied or inherent limitations on the amending power under Article 368. We are unable to accept this contention. The broad contours the basic elements or fundamental features of our Constitution are clearly delineated in the preamble. Unlike in most of the other Constitution, it is comparatively easy in the case of our Constitution to discern and determine the basic elements or the fundamental features of our Constitution. For doing so, one has only to look to the preamble. It is true that there are bound to be border line cases where there can be difference of opinion. That is so in all important legal questions. But the courts generally proceed on the presumption of constitutionality of all legislations. The presumption of the constitutional validity of a statute will also apply to constitutional amendments. It is not correct to say that what is difficult to decide does not exist at all. For that matter, there are no clear guidelines before the Parliament to determine what are essential legislative functions which cannot be delegated, what legislations do invade on the judicial power or what restrictions are reasonable restrictions in public interest under Article 19(2) to 19(6) and yet by and large the legislations made by Parliament or the State Legislatures in those respects have been upheld by courts. No doubt, there were occasions when courts were constrained to strike down some legislations as ultra vires the Constitution. The position as regards the ascertainment of the basic elements or fundamental features of the Constitution can by no means be more difficult that the difficulty of the Legislatures to determine before hand the constitutionality of legislations made under various other heads. Arguments based on the difficulties likely to be faced by the Legislatures are of very little importance and they are essentially arguments against judicial review.

---

[83] (1878) 5 IA 178.

662. Large number of decisions rendered by courts in U. S. A., Canada, Australia, United Kingdom, Ceylon and Ireland, dealing with the question of implied limitations on the amending power and also as regards the meaning of the word "amendment" were read to us at the hearing. Such of those that are relevant have been considered by the learned Chief Justice in the judgment just now delivered. We entirely agree with the views expressed by him and we cannot usefully add to the same.

663. It was contended on behalf of the Union and the States that, the Constitution should not be treated as something sacred. It should be regarded just in the same way as we regard other human institutions. It should be possible to alter every part of it from time to time so as to bring it in harmony with the new and changed conditions. In support of this contention we were invited to the writings of the various writers such as Burgess, Bryce, Willis, Orfield, Weaver Livingston etc. It was further urged that the Constituent Assembly, knowing that it will disperse, had arranged for the recreation of a Constituent Assembly under Article 368 in order to so shape the Constitution as to meet the demands of the time. However, attractive these theories may sound in the abstract, on a closer examination, it will be seen that they are fallacious more particularly in a constitutional set up like ours. We have earlier noticed that under our electoral system, it is possible for a party to get a 2/3rd majority in the two Houses of Parliament even if that party does not get an absolute majority of votes cast at the election. That apart, when a party goes to election, it presents to the electorate diverse programmes and holds out various promises The programmes presented or the promises held out need not necessarily include proposals for amending the Constitution. During the General Elections to Parliament in 1952, 1957, 1962 and 1967, no proposal to amend the Constitution appears to have been placed before the electorate. Even when proposals for amendment of the Constitution are placed before the electorate as was done by the Congress Party in 1971, the proposed amendments are not usually placed before the electorate. Under these circumstances, the claim that the electorate had given a mandate to the party to amend the Constitution in any particular manner is unjustified. Further a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet Government are such that the people as a whole can have little control in the matter of detailed law-making. "…………on practically every issue in the modern State, the serried millions of voters cannot do more than accept or reject the solutions offered. The stage is too vast to permit of the nice shades of quantitative distinction impressing themselves upon the public mind. It has rarely the leisure, and seldom the information, to do more than indicate the general tendency of its will. It is in the process of law-making that the subtler adjustments must be effected". (Laski: *A Grammar of Politics*, Fifth Ed., pp. 313-314).

664. The assertion that either the majority of members of Parliament or even 2/3rd members of Parliament speak on behalf of the nation has no basis in fact. Indeed it may be possible for the ruling party to carry through important constitutional amendments even after it has lost the confidence of the electorate. The members of Lok Sabha are elected for a term of five years. The ruling party or its members may or may not enjoy the confidence of the electorate throughout their term of office. Therefore it will not be correct to say that whenever Parliament amends the Constitution, it must be held to have done it as desired by the people.

665. There is a further fellacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adapt the Constitution to respond to the growing needs of the people. We have earlier seen that by using the amending power, it is theoretically possible for Parliament to extend its own life indefinitely and also, to amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards. A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest.

666. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a Welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way. Human freedoms are lost gradually and imperceptively and their destruction is generally followed by authortarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of governments are not averse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest.

But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedoms sets a pattern for further encroachments. Our constitutional plan is to eradicate poverty without destruction of individual freedoms.

667. In the result we uphold the contention of Mr. Palkhivala that the word "amendment" in Article 368 carries with it certain limitation and, further, that the power conferred under Article 368 is subject to certain implied limitations though that power is quite large.

668. Next, we shall take up for consideration the contentions of Mr. Palkhivala regarding the validity of the 24th, 25th and 29th Amendments.

669. It was contended on behalf of the petitioners that in enacting the 24th Amendment Act, the Parliament has exceeded its powers. It has purported to enlarge its limited power of amendment into an unlimited power, by the exercise of which it can damage or destroy the basic elements or fundamental features of the Constitution. It was said that such an exercise is an unlawful usurpation of power. Consequently, the 24th Amendment Act is liable to be struck down. To pronounce on that contention, it is necessary to examine at the very outset whether the 24th Amendment Act has really enlarged the powers of the Parliament. If we come to the conclusions that it has not enlarged the power of the Parliament, as we think it has not, the various contentions of Mr. Palkhivala do not arise for consideration.

670. Now let us see what is the true effect of the Constitution 24th Amendment Act, 1971. That Act amended Article 13 and Article 368. By that Act one more sub-article has been added to Article 13, viz. sub-article (4) which reads thus:

> "Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

671. Section 3 of that Act which amends Article 368 reads:

> "Article 368 of the Constitution shall be renumbered as clause (2) thereof, and—
>
> (*a*) for the marginal heading to that article the following marginal heading shall be substituted, namely:
>
> 'Power of Parliament to amend the Constitution and procedure therefor.'
>
> (*b*) before clause (2) as so-renumbered, the following clause shall be inserted, namely:
>
> 'Notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.'
>
> (*c*) in clause (2) as so re-numbered, for the words 'it shall be presented to the President for his assent and upon such assent being given to the Bill', the words 'it shall be presented to the President who shall give his assent to the Bill and thereupon' shall be substituted;
>
> (*d*) after clause (2) as so re-numbered, the following clause shall be inserted, namely:
>
> "(3) Nothing in Article 13 shall apply to any amendment made under this Article."

672. The material changes effected under this Act are—

(1) addition of clause (4) to Article 13 and clause (3) to Article 368;
(2) change in the marginal heading;
(3) specific mention of the fact that the power is conferred on the Parliament to amend the Constitution;
(4) the power conferred on the Parliament is claimed to be a constituent power;
(5) that power is prescribed as a power to "amend by way of addition, variation or repeal of any provision of this Constitution"; and
(6) making it obligatory for the President to give assent to the Bill amending the Constitution.

673. In our opinion the 24th Amendment has not made any material change in Article 368 as it stood originally. It is true the original Article did not say specifically that the power to amend rested with Parliament. On the other hand, while setting out the procedure of amendment, it referred to the functions of the two Houses of Parliament and the President. Because of the fact that Parliament was not specifically referred to in Article 368, as it originally stood, the learned Advocate-General of Maharashtra wanted us to spell out that the power conferred under Article 368, as it originally stood was not conferred on Parliament as such but on the two Houses of Parliament. We have earlier rejected that contention. We agree with the learned Attorney-General that the power in question had been conferred on Parliament. Article 79 says that "There shall be a Parliament for the Union, which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People". Whether an enactment refers to the three components of Parliament separately or whether all the three of them are compendiously referred to as Parliament, in law it makes no difference. In *Sankari Prasad's case* (supra), in *Sajjan Singh's case* (supra), as well as in *Golaknath's case* (supra) each one of the Judges who delivered judgments specifically mentioned that the power to amend the Constitution was vested in Parliament though there was difference of opinion on the question whether that power could be traced to Article 368 or Article 248 read with Entry 97 of List I. There is no ground for taking a different view.

674. We have already come to the conclusion that Article 368 as it originally stood comprehended both power as well as procedure to amend the Constitution. Hence the change effected in the marginal note has no significance whatsoever. The marginal note as it stood earlier was in a sense incomplete. The expression 'constituent power' is used to describe only the nature of the power of amendment. Every amending power, however large or however small it might be, is a facet of a constituent power. The power, though described to be 'constituent power', still continues to be an 'amending power'. The scope and ambit of the power is essentially contained in the word 'amendment'. Hence, from the fact that the new Article specifically refers to that power as a constituent power, it cannot he understood that the contents of the power have undergone any change. The power conferred under the original Article being a limited power to amend the Constitution, the constituent power to amend the Constitution referred to in the amended Article must also be held to carry with it the limitations to which that power was subject earlier. There is also no significance in the substitution of the expression "amend by way of addition, variation or repeal of any provision of this Constitution" found in the amended Article in the place of the expression "amendment of the Constitution" found in the original Article. Every power to amend a statute must necessarily include within itself some power to make addition, variation or repeal of any provision of the statute. Here, again, the power conferred under the original Article being a limited one, that limitation will continue to operate notwithstanding the change in the phraseology. The words 'addition, variation or repeal' only prescribe the modes or manner by which an 'amendment' may be made, but they do not determine the scope of the power of 'amendment'. The original Article 368 mentioned that after the bill for amendment of the Constitution is passed by the two Houses of Parliament in the manner prescribed in Article 368 "it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the bill". The amended Article makes a change. It prescribes that when the Bill is presented to the President, he "shall give his assent to the Bill". Some comment was made at the bar about the inappropriateness of commanding the President to give his assent to Bill. That is a question of propriety. The substance of the matter is that when the Bill is presented to the President, he shall not withhold his assent. This change cannot be said to have damaged or destroyed any basic element of the Constitution. In fact Article 111 which deals with the assent to the Bills specifically prescribes that when a money Bill, after having been passed by the Houses of Parliament is presented to the President he "shall not withhold assent therefrom". Hence it cannot be said that the change made in Article 368 relating to the assent of the President has any great importance in the scheme of our Constitution. In fact under our Constitution the President is only a constitutional head. Ordinarily he has to act on the advice of the cabinet. There is no possibility of the Constitution being amended in opposition to the wishes of the cabinet.

675. The only change that remains to be considered is as to the exclusion of the application of Article 13 to an amendment of the Constitution. We have earlier come to the conclusion that Article 13 as it stood earlier did not bar the amendment of the Constitution. Articles 13(4) and 368(3) make explicit what was implicit.

676. It was contended that by means of the 24th Amendment Parliament intended to and in fact purported to enlarge its amending power. In this connection reliance was placed on the statements of objects and reasons attached to the Bill which resulted in the 24th Amendment. The power of Parliamnet does not rest upon its professed intention. It cannot acquire a power which it otherwise did not possess. We are unable to accept the contention that clause (*e*) to the proviso to Article 368 confers power on Parliament to enlarge its own power. In our judgment the power to amend the Constitution as well as the ordinary procedure to amend any part of the Constitution was and is contained in the main part of the Article. The proviso merely places further restrictions on the procedure to amend the Articles mentioned therein. Clause (*e*) to the proviso stipulates that Article 368 cannot be amended except in the manner provided in the proviso. In the absence of that clause, Article 368 could have been amended by following the procedure laid down in the main part. At best clause (*e*) of the proviso merely indicates that Article 368 itself comes within its own purview. As we have already seen, the main part of Article 368 as it stood earlier, expressly lays down only the procedure to be followed in amending the Constitution. The power to amend is only implied therein.

677. It is difficult to accept the contention that an implied power was impliedly permitted to be enlarged. If that was so, there was no meaning in limiting that power originally. Limitation on the power to amend the Constitution would operate even when Article 368 is amended. A limited power cannot be used to enlarge the same power into an absolute power. We respectfully agree with the observation of Hidayatullah, J. (as he then was) in *Golaknath's case* (supra) that what Parliament cannot do directly, it also cannot do indireclty. We have earlier held that the "amendment of this Constitution" means the amendment of every part of the Constitution. It cannot be denied that Article 368 is but a part of the Constitution. Hence the mere, fact that the mover of the 24th Amendment Act, in the Statement of Objects and Reasons laid claim to certain power does not go to show that Parliament either endorsed that claim or could have conferred on itself such a power. It must be deemed to have exercised only such power as it possessed. It is a well-accepted rule of construction that if a provision is reasonably capable of two interpretations the Court must accept that interpretation which makes the provision valid. If the power conferred on Parliament to amend the Constitution under Article 368 as it stood originally is a limited power, as we think it is, Parliament cannot enlarge the scope of that power—see *Attorney-General for the State of New South Wales* v. *The Breuery Employees Union of New South Wales*[84]; *Ex Parte Walsh and Johnson*; *In re Yates*[85]; and *Australian Communist Party* v. *The Commonwealth*.[86]

678. For the reasons mentioned heretofore, the scope of Parliament's Power to amend the Constitution or any part thereof must be held to have remained as it was before the 24th Amendment notwithstanding the alterations made in the phraseology of Article 368. The 24th Amendment made explicit, what was implicit in the unamended Article 368. In this view of the matter the 24th Amendment must be held to be valid.

679. This takes us to the validity of the Constitution 25th Amendment Act. It is necessary to examine the scope and effect of that Act for deciding the question whether that Act or any one of its provisions can be held to be outside the amending power of the Parliament. That Act has three sections. We are not conerned with the first section which sets out the short title. Clause (*a*) of the second section amends Article 31(2). Clause (*b*) of that section incorporates into the Constitution Article 31(2-B). Section 3 introduces into the Constitution a new Article viz. Article 31-C.

680. Let us first take up the newly substituted Article 31(2) in the place of the old Article 31(2) and examine its scope. To do so, it is necessary to examine the history of that Article.

681. Article 31(2) has undergone several changes. As originally enacted it read thus;

> "No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which and the manner in which, the compensation is to be determined and given."

682. That Article was amended first by the Fourth Amendment Act, 1955 and thereafter, by the Twenty-fifth Amendment Act, 1971. At a later stage, it will be necessary for us to compare Article 31(2) as it stood after the Fourth Amendment Act and as it stands after the Twenty-fifth Amendment Act. Hence we shall quote them side by side.

---

[84] 6 CLR 469.
[85] 37 CLR 36 at 67.
[86] 83 CLR 1.

Article 31(2) as substituted by the 4th Amendment Act, 1955	*Article 31(2) as substituted by the 25th Amendment Act, 1971*
No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.	No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance which such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash: Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict, or abrogate the right guaranteed under that clause.

683. For finding out the true scope of Article 31(2) as it stands now, the learned Advocate-General of Maharashtra as well as the Solicitor-General has taken us through the history of this article. According to them the article as it stands now truly represents the intention of the Constitution-makers. In support of that contention, we were asked to go through the Constituent Assembly debates relating to that article. In particular we were invited to go through the speeches made by Pandit Nehru, Sir Alladi Krishnaswami Ayyar, Dr. Munshi and Dr. Ambedkar. In our opinion, it is impermissible for us to do so. It is a well settled rule of construction that speeches made by members of a Legislature in the course of debates relating to the enactment of a Statute cannot be used as aids for interpreting any of the provisions of the statute. The same rule is applicable when we are called upon to interpret the provisions of a Constitution. This Court ruled in *State of Travancore Cochin and Others* v. *Bombay Co. Ltd.*[87] that speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used as aid for interpreting the Constitution. In the course of his judgment Patanjali Sastri, C. J., speaking for the Constitution Bench

[87] 1952 SCR 112: AIR 1952 SC 366: 1952 SCJ 527: (1952) 3 STC 434.

observed at p. 1121 of the Report:

> "It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aids to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian Statutes—See *Administrator-General of Bengal* v. *Prem Nath Mallick*, (1895) 22 IA 107, 118. The reason behind the rule was explained by one of us in *Gopalan's case*[88] thus:
>
> A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the Bill. Nor is it reasonable to assumed that the minds of all those legislature were in accord", or as it is more tersely put in an American case—Those who did not speak may not have agreed with those who did; and those who speak might differ from each other—*United States* v. *Trans-Missouri Freight Association.*"[89]

684. No decision of this Court dissenting from the view taken in the above case was brought to our notice. But it was urged that this Court had ignored the rule laid down in *Bombay Co.'s case* (supra) in *Golaknath's case* (supra) as well as in what is popularly known as the *Privy Purse case.*[90] We do not think that this statement is accurate. In *Golaknath's case* (supra) Subba Rao, C. J., referred to certain portions of speeches made by Pandit Nehru and Dr. Ambedkar. But he made it clear at p. 792 of the Report, the specific purpose for which he was referring to those speeches. This is what he stated:

> "We have referreed to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of Article 368 which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution."

685. Bachawat, J., in the course of his judgment also referred to some of the speeches made during the debates on Article 368. But before doing so this is what he observed at p. 922 of the report:

> "Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution. These speeches cannot be used as aids for interpreting the Constitution—See *State of Travancore Cochin and Others* v. *The Bombay Co. Ltd.* (supra). Accordingly I do not rely on them as aids to construction. But I propose to refer to them as Shri A. K. Sen relied heavily on the speeches of Dr. B. R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches......"

686. From these observations, it is clear that the learned judges were not referring to the speeches as aids for interpreting any of the provisions of the Constitution.

---

[88] 1950 SCR 88 at 144: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

[89] 169 US 290, 318.

[90] (1971) 3 SCR 9: (1971) 1 SCC 85.

687. Now let us turn to this Court's judgment in the *Privy Purse case* (supra) Shah, J., (as he then was) in the course of his judgment (at p. 83 of the report)* quoted a portion of the speech of the Home Minister Sardar Patel not for the purpose of interpreting any provision of the Constitution but for showing the circumstances which necessitated the giving of certain guarantees to the former rulers. That speech succinctly sets out why certain guarantees had to be given to the rulers. Hence it is not correct to say that Shah, J., speaking for himself and six other judges had used the speech of Sardar Patel in aid of the construction of any of the articles of the Constitution. It is true Mitter, J., in his dissenting judgment (at p. 121 of the report)† used the speech of Shri T. T. Krishnamachari in aid of the construction of Article 363 but the learned judge no where in his judgment discussed the question whether the speeches made by the members of the Constituent Assembly were admissible in aid of interpreting any provision of the Constitution.

688. Before concluding the discussion on this topic, it is necessary to refer to one more decision of this Court i. e. *Union of India* v. *H. S. Dhillon*[91] In that case this Court was called upon to decide whether the provisions in the Wealth Tax Act, 1957 providing for the levy of tax on the capital value of agricultural property were constitutionally sustainable. By a majority of four against three, this Court upheld the levy. Sikri, C. J., who spoke for himself and two other judges after sustaining the validity of the provision on an examination of the relevant provisions of the Constitution as well as the decided cases referred to some of the speeches made during the debates in he Constituent Assembly in support of the conclusion already reached by him Before referring to those speeches this is what the learned Judge observed at p. 58 (P. 795, Para 33 of SCC):

> "We are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended."

689. From this it is clear that the learned judge did not seek any aid from the speeches for the purpose of interpreting the relevant provision. It is necessary to note that the learned judge did not dissent from the view earlier taken by this Court in *Bombay Co. Ltd.'s case* (supra). Hence the law as laid down in *Bombay Co.'s case* (supra), is binding on us and its correctness was not challenged before us.

690. The learned Advocate-General of Maharashtra is right in his contention that for finding out the true scope of Article 31(2), as it stands at present, it is necessary for us to find out the mischief that was intended to be remedied by the present amendment. In other words, we must find out what was the objective intended to be achieved by that amendment. The original Article 31(2) first came up for consideration by this Court in *State of West Bengal* v. *Mrs. Bela Bannerjee and Others*,[92] wherein Patanjali Sastri, C. J., speaking for the court observed:

> "While it is true that the Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full

---

[91] (1972) 2 SCR 33: (1971) 2 SCC 779.

* P. 153 of SCC.

[92] 1954 SCR 588: AIR 1954 SC 170: 1954 SCJ 95.

† P. 214 of SCC.

> indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed."

691. We are told that Article 31(2) came to be amended by means of the 4th Amendment Act in view of the decision of this Court in *Mrs. Bela Bannerjee's case* (supra). The scope of the article as amended by the 4th Amendment Act was considered by this Court in *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras and Another*.[93] Therein Subba Rao, J. (as he then was) speaking for a bench consisting of himself, Wanchoo, Hidayatullah, Raghubar Dayal and Sikri, JJ., observed (at p. 626):

> "The fact that Parliament used the same expressions namely 'compensation' and 'Principles' as were found in Article 31 before the Amendment is a clear indication that it accepted the meaning given by this Court those expressions in *Mrs. Bela Banerjee's case* (supra). It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like 'price', 'consideration' etc."

Proceeding further the learned Judge observed:

> "The real difficulty is, what is the effect of ouster of jurisdiction of the Court to question the law on the ground that the 'compensation' provided by the law is not adequate? It will be noticed that the law of acquisition or requisition is not wholly immune from scrutiny by the Court. But what is excluded from the Court's jurisdiction is that the said law cannot be questioned on the ground that the compensation provided by that law is not adequate. It will further be noticed that the clause excluding the jurisdiction of the Court also used the word 'compensation' indicating thereby that what is exlcuded from the Court's jurisdiction is the adequacy of the compensation fixed by the Legislature. The argument that the word 'compensation' means a just equivalent for the property acquired and, therefore, the Court can ascertain whether it is a 'just equivalent" or not makes the amendment of the Constitution nugatory. It will be arguing in a circle. Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate; a law is made to acquire a house, its value at the time of acquisition has to be fixed; there are many modes of valuation namely estimate by the engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher valve and the adoption of another principle may give a lesser value. But nontheless they are principles on which and the manner in which compensation is

---

[93] (1965) 1 SCR 614: AIR 1965 SC 1017: (1964) 2 SCJ 703.

determined. The court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy. *On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31(2) of the Constitution*.............................. In such cases the validity of the principles can be scrutinized. *The law may also prescribe a compensation which is illusory*; it may provide for the acquisition of a property worth lakhs of rupees for a paltry sum of Rs. 100. The question in that context does not relate to the adequacy of the compensation for it is no compensation at all. The illustrations given by us are not exhaustive. There may be many others falling on either side of the line. But this much is clear. *If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power*, and therefore, the law is bad. It is a use of the protection of Article 31 in a manner which the Article hardly intended."

(emphasis supplied)

692. The principles that emerge from the decision in *Vajravelu's case* (supra), are: (1) compensation means just equivalent of the value of the property acquired; (2) principles prescribed must be principles which provide for compensation; (3) adequacy of compensation fixed or to be determined on the basis of the principles set out cannot be gone into by the court; (4) the principles fixed must be relevant to the property acquired or to the value of the property at about the time it is acquired; (5) the compensation fixed should not be illusory and (6) courts have power to strike down a law on the ground of fraud on power if the principles fixed are irrelevant or if the compensation granted is illusory.

693. The next decision cited to us is the decision of this Court in *Union of India* v. *Metal Corporation of India Ltd. and Another*.[94] It is a decision of a Division Bench consisting of Subba Rao, C. J. and Shelat, J. As that decision was overruled by this Court in *State of Gujarat* v. *Shantilal Mangaldas and Others*,[95] it is not necessary to refer to its ratio.

694. This takes us to the decision of this Court in *Shantilal's case* (supra). This case related to the acquisition of some landed property on behalf of the Borough Municipality of Ahmedabad for making town planning scheme under the Bombay Town Planning Act, 1955. Sections 53 and 57 of that Act fixed certain principles for the determination of compensation for the land acquired. The High Court of Gujarat declared that those provisions were ultra vires in so far as they authorised the local authority to acquire land under a town Planning Scheme and as a corollary to that view declared invalid the City Wall Improvement Town Planning Scheme No. 5 framed in exercise of the powers conferred under the Act. In doing so they purported to follow the decision of this Court in *Vajravelu Mudaliars' case* (supra). A Constitution Bench of this Court reversed the decision of the Gujarat High Court. In that case Shah, J., speaking for the Court elaborately reviewed the earlier decisions of this Court bearing on Article 31(2). After doing so, he observed at p. 365 of the report (p. 529 of SCC):

> "Reverting to the amendment made in clause (2) of Article 31 by the Constitution (Fourth Amendment) Act, 1955, it is clear that adequacy of

---

[94] (1967) 1 SCR 255 : AIR 1967 SC 637 : (1967) 1 SCJ 182 : 37 Com Cas 1.

[95] (1969) 3 SCR 341 : (1969) 1 SCC 509.

> compensation fixed by the Legislature or awarded according to the principles specified by the Legislature for determination is not justiciable. It clearly follows from the terms of Article 31(2) as amended that the amount of compensation payable if fixed by the Legislature, is not justiciable because the challenge in such a case, apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation. *If Compensation fixed by the Legislature—and by the use of the expression 'Compensation' we mean what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property and not something which by abuse of Legislature power though called compensation is not a recompense at all or is something illusory, is not justiciable,* on the plea what it is not a just equivalent of the property compulsorily acquired is it open to the Courts to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent? In our view, such an enquiry is not open to the Court under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act. If the quantum of compensation fixed by the Legislature is not liable to be canvessed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent. The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed; *it does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitrariness and permit a device to defeat the constitutional guarantee.* But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. *Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation.* A challenge to a statute that the principles specified by it do not award adjust equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable."
>
> (emphasis supplied)

695. The Advocate-General of Maharashtra contended that if only this decision had not been indirectly overruled by the *Bank Nationalisation case* (*R. C. Cooper* v. *Union of India*)[96] there would have been no occasion to further amend Article 31(2). That being so, it is necessary to find out clearly as to what are the principles enunciated in this decision. This decision firmly laid down that any arbitrary fixation of recompense is liable to be struck down by the Court as an abuse of legislative power. It further laid down that the principles laid down may be challenged on the ground that they are not relevant for the purpose of determining the recompense payable to the owner of the property acquired. If the recompense fixed or determined is either not arbitrary or illusory or if the principles fixed are relevant to the purpose of acquisition or requisition of the property in question, the courts cannot go into the question of adequacy of the payment.

---

[96] (1970) 3 SCR 530: (1970) 1 SCC 248.

696. Then came the *Bank Nationalisation case* (supra). The majority judgment in that case was delivered by Shah, J. (as he then was). In that judgment he referred somewhat extensively to the decision in *Shantilal Mangaldas's case* (supra) and other cases rendered by this Court. He did not purport to deviate from the rule laid down in *Shantilal's case* (supra). The ratio of that decision relating to Article 31(2) is found at p. 598 (p. 304, para 91 of SCC) of the report. The learned judge observed :

> "Both the lines of thought in *Vajaravelu's case* (supra) and *Shantilal's case* (supra) which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *P. Vajravelu Mudaliar's case* (supra) or in *Shantilal Mangaldas's case* (supra), the Act in our judgment is liable to be struck down as is fails to provide to the expropriated banks compensation determined according to relevant principles."

Proceeding further the learned Judge observed at p. 599 (para 92 of SCC) :

> "We are unable to hold that a principle specified by the Parliament for determining compensation of the property to be acquired is conclusive. If that view be expressed, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired. If several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles is not open to the challenge for the selection must be left to the wisdom of the Parliament."

697. It is clear from the passages we have quoted above that this case also emphasised that the power of the Parliament to fix the compensation for the property acquired is not an arbitrary power. Further, the principles prescribed for determining the compensation must be relevant to the subject-matter of acquisition or requisition. That decision also laid down that both the questions whether the compensation has been fixed arbitrarily or whether the principles laid down are irrelevant are open to judicial review.

698. Let us now examine Article 31(2) as it stands now in the light of the decisions already referred to. The only material changes made in that Article under the 25th Amendment Act are—

(1) in place of the word 'compensation' the word 'amount' has been used, and

(2) an additional clase viz., "or that the whole or any part of such amount is to be given otherwise than in cash" has been added.

699. We are not concerned in this case as to the effect of the additional clause. No arguments were advanced on that aspect. All that we are concerned with is as to what is the effect of the substitution of the word "amount" in place of the word "compensation". As seen earlier, the word "compensation" has been interpreted in the various decisions referred to earlier as "just equivalent" of the value of the property taken. That concept has now been removed. In other respects, the Article has not been altered. It remains what it was. We have earlier noticed that the decisions of this Court have firmly laid down that while examining the validity of law made under Article 31(2) as it stood after it was amended under the 4th Amendment Act, it was open to the court to go into the questions whether the compensation had been fixed arbitrarily and whether the same was illusory. Those decisions further ruled that the court can go into the relevance of the principles fixed. Parliament would have undoubtedly known the ratio of those decisions. That is also the legal presumption. Hence if the Parliament intended to take away the judicial review in any respect other than relating to the adequacy of the amount fixed, it would have expressed its intention by appropriate words. We find no such words in the Article as it stands. Therefore, it is reasonable to assume that it has accepted the interpretation placed by this Court in all respects except as regards the concept of compensation. That this is the mischief which the 25th Amendment seeks to remedy by amending Article 31(2) is also clear from the language of the amended Article itself. It says that the law shall not be called in question on the ground that the amount fixed or determined is not adequate. What is an adequate amount? An amount can be said to be adequate only when the owner of the property is fully compensated, that is when he is paid an amount which is equivalent in value to the property acquired or requisitioned. And that is also what is connoted by the concept of 'compensation' as interpreted by this Court. Therefore, stated briefly, what the 25th Amendment makes non-justiciable is an enquiry into the question whether the amount fixed or determined is an equivalent value of or 'compensation' for the property acquired or requisitioned.

700. The word "amount" is a neutral word. Standing by itself, it has no norm and is completely colourless. The dictionary meaning of the word appropriate to the present context is "sum total or a figure". We have to find out its connotation from the context. In so doing, we have to bear in mind the fact that Article 31(2) still continues to be a fundamental right. It is not possible to accept the contention of the learned Advocate-General of Maharashtra and the learned Solicitor-General that the right of the owner at present is just to get whatever the Government pleasures to give, whenever it pleases to give and however it pleases to give. A position so nebulous as that cannot be considered as a right mush less a fundamental right, which Article 31(2) still claims to be.

701. It is difficult to believe that Parliament intended to make a mockery of the fundamental right conferred under Article 31(2). It cannot be that the Constitution while purporting to preserve the fundamental right of the citizens to get an "amount" in lieu of the property taken for public purpose has in fact robbed him of all his right.

702. Undoubtedly Articles 31 empowers the Legislature to acquire or requisition the property of a citizen for an "amount". What does the word "amount" mean in that Article? As we have already said, that word by itself does not disclose any norm. But then the word "amount" is followed by the words "which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate".

703. If the expression "amount" has no norm and is just what the Parliament stipulates, there can be no question of prescribing principles for determining that "amount"; nor is there any scope for finding out its adequacy. The Legislatures are permitted under the amended Article 31(2) either to fix the "amount" to be paid in lieu of the property acquired or to lay down the principles for determining that "amount". These two alternative methods must bring about nearly the same result. If the relevancy of the principles fixed can be judicially reviewed—as indeed they must be—in view of the decisions referred to earlier, we fail to see how the fixation of the "amount" which is the alternative method of determining the recompense to be paid in lieu of the property taken is excluded from judicial review.

704. The word "fixed" in Article 31(2) connotes or postulates that there must be some standard or principle by the application of which the legislature calculates or ascertains definitely the amount. In *Bouyiar's Law Dictionary*, (1946) at p. 421, the word 'fix' is defined thus: "To determine; to settle. A constitutional provision to the effect that the General Assembly shall fix the compensation of officers means that it shall prescribe or 'fix' the rule by which such compensation is to be determined". [See also *Fraser Henlein Pty. Ltd.* v. *Cody*,[97] cited in Saunders, *Words and Phrases: Legally Defined*, Vol. 2, p. 258 (1969)]. This being the meaning of the word 'fix', it would be necessary for the Legislature to lay down in the law itself or otherwise indicate the principles on the basis of which it fixes the amount for the acquisition or requisitioning of the property. If this construction is placed on the first mode of determining the amount, then there would be no difference between this method, and the other method whereby the legislature lays down the principles and leaves it for any other authority to determine the amount in accordance with such principles. Whether the legislature adopts one or the other method, the requirement of Article 31(2) would be the same, namely, there must be principles on the basis of which the amount is determined. Such an amount may be determined either by the Legislature or by some other authority authorised by the Legislature. The content of the right in Article 31(2) is not dependent upon whether the Legislature chooses one or the other method of determining the amount. There is not contradiction between these two methods. It is true that in both cases, the judicial review is necessarily limited because it cannot extend to the examination of the adequacy of the amount fixed or to be determined. It was conceded on behalf of the contesting respondents that the court can go into the question whether the "amount" fixed is illusory. This very concession shows the untenability of the contention advanced on behalf of the Union. For determining whether the "amount" fixed is illusory or not, one has first to determine the value of the property because without knowing the true value of the property, no court can say that the "amount" fixed is illusory. Further, when Article 31(2) says that it is not open to the court to examine whether the "amount" fixed or determined is adequate or not, it necessarily means that the "amount" payable has to be determined on the basis of principles relevant for determining the value of the property acquired or requisitioned. There can be no question of adequacy unless the "amount" payable has been determined on the basis of certain norms and not arbitrarily, without having regard to the value of the property.

705. Further, Article 31(2) provides for fixing or determining the amount for the acquisition or requistioning of the property. The State action is still described as 'acquisition or requisition'and not 'confiscation . Therefore, the principles for fixing or determining the amount must be relevant to the 'acquisition or requisition', and not to 'confiscation'. The amount fixed or determined should not make it appear that the measure is one of confiscation. The principles for fixing or determining the amount may be said to be relevant to the acquisition or requisition when they bear reasonable relationship to the value of the property acquired or requisitioned.

---

[97] *(1945) 70 CLR 100 at 128.*

706. Further there is practical difficulty in accepting the contention that the word "amount" in the context in which it is used, has no norm. The amount has to be fixed by the legislatures which means by the members of the legislatures. When a law for acquisition of certain types of property is enacted, it is not as if the members of the Legislature—each and every one of them who participates in the making of the law would first go and inspect the property to be acquired and then assess the value of that property. In the very nature of things, the "amount" payable has to be determined on the basis of certain principles. If that be so, as it appears to be obvious, then the Legislators must have some principles before them to determine the amount. In this connection the Advocate-General of Maharashtra tried to give an explanation, which appears to us to be unsatisfactory and unacceptable. His contention was that our democracy is work on the basis of party system. The ruling party has the majority of the members of the Legislature behind it. Therefore, the member of the opposition party need not know the basis of fixation of the value of the property acquired. Even the members of the ruling party need not be told about the basis on which the value is fixed. The option before them is either to accept the amount fixed by the cabinet or by the Minister concerned or to reject the proposal and face the consequences. If this is the true position, it is, in our opinion, a negation of parliamentary democracy. Our democracy like all true parliamentary democracies is based on the principles of debate and discussion. As far as possible, decisions in the Legislatures are arrived at on the basis of consensus. Our Constitution does not provide for one party rule where there is no room for opposition. Opposition parties have an important role to pay under our Constitution. Members belonging to the opposition parties have as much right to participate in making laws as the members belonging to the ruling party. Further, the learned Advocate-General is not correct in his assumption that the function of the members belonging to the ruling party is to blindly support a measure sponsored by the executive. They also have a right, may, a duty to mould every measure by debate and discussion. If the question of fixation of "amount" under Article 31(2) is considered as the exclusive function of the executive then, not only the judicial review will be taken away, even the Legislature will not have the opportunity of examining the correctness or appropriatness of the "amount" fixed. A power so arbitrary as that can speedily degenerate into an instrument of oppression and is likely to be used for collateral purposes. Our Constitution has created checks and balances to minimise the possibility of power being misused. We have no doubt that the theory propounded by the Advocate-General of Maharashtra will be repudiated by our Legislatures and the cabinets as something wholly foreign to our Constitution.

707. If we bear in mind the fact that the "amount" in question is to be paid in lieu of the property taken then, it follows that it must have a reasonable relationship with the value of the property taken. It may not be the market value of the property taken. The market value of a property is the result of an interaction of various forces. It may not have any reasonable relationship with the investment made by its successive owners. The price of the property acquired might have shot up because of various contributions made by the society such as improvements effected by the State in the locality in question or the conversion of a rural area into an urban area. It is undoubtedly open to the State to appropriate to itself that part of the market value of a property which is not the result of any contribution made by its owners. There may be several other relevant grounds for fixing a particular "amount" in a given case or for adopting one or more of the relevant principles for the determination of the price to be paid. In all these matters the Legislative judgment is entitled to great weight. It will be for the aggrieved party to clearly satisfy the court that the basis adopted by the Legislature has no reasonable relationship to the value of the property acquired or that the 'amount" to be paid has been arbitrarily fixed or that the same is an illusory return for the property taken. So long as the basis adopted for computing the value of the property is relevant to the acquisition in question or the amount fixed can be justified on any such basis, it is no more open to the court to consider whether the amount fixed or to be determined is adequate. But it is still open to the court to consider whether the "amount" in question has been arbitrarily determined or whether the same is an illusory return for the property taken. It is also open to the court to consider whether the principles laid down for the determination of the amount are irrelevant for the acquisition or requisition in question. To put it differently, the judicial review under the amended Article 31(2) lies within narrow limits. The court cannot go into the question whether what is paid or is payable is compensation. It can only go into the question whether the "amount" in question was arbitrarily fixed as illusory or whether the principles laid down for the purpose of determining the "amount" payable have reasonable relationship with the value of the property acquired or requisitioned.

708. If the amended Article 31(2) is understood in the manner as laid down above, the right to property cannot be said to have been damaged or destroyed. The amended Article 31(2) according to us fully protects the interests of the individuals as well as that of the society. Hence its validity is not open to challenge.

709. Now, let us turn to Article 31(2-B). It says that "Nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)". This provision has no real impact on the right conferred under Article 31(2). Article 31(2) empowers the State to compulsorily acquire or requisition property for public purpose. When property is acquired or requisitioned for public purpose, the right of the owner of that property to hold or dispose of that property is necessarily lost. Hence there is no anti-thesis between Article 19(1)(*f*) and Article 31(2). That being so, the only assistance that the owner of the property acquired or requisitioned would have obtained from Article 19(1)(*f*) read with sub-article (5) of that article would be the right to insist that the law made under Article 31(2) as it stood before its recent amendment, should have to conform to some reasonable procedure both in the matter of dispossessing him as well as in the matter of determining the "amount" payable to him. In a way, those rights are protected by the principle of natural justice.

710. For the reasons mentioned above, we are unable to accept the contention urged on behalf of the petitioners that Section 2 of the 25th Amendment Act, 1971 is invalid.

711. This takes us to Section 3 of the 25th Amendment Act which now stands as Article 31-C of the Constitution. This Article empowers the Parliament as well as the Legislatures to enact laws giving effect to the Policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39, completely ignoring in the process, Articles 14, 19 and 31. Further it lays down that if the law in question contains a declaration that it is for giving effect to such policy, that law shall not be called in question in any court on the ground that it does not give effect to such policy. The proviso to that Article prescribes that where such a law is made by the Legislature of a State, the provisions of Article 31-C shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent. This Article has two parts. The first part says that laws enacted by Parliament as well as by the Local Legislatures for giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall not be deemed to be void on the ground that it is inconsistent with or takes away of abridges any of the rights conferred by Articles 14, 19 and 31 notwithstanding anything contained in Article 13 and the second part provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. Clauses (*b*) and (*c*) of Article 39 do not prescribe any subject-matter of legislation. They contain certain objectives to be achieved. The methods to be adopted to achieve those objectives may be numerous. Those clauses cover a very large field of social and economic activities of the Union and the States. Clause (*b*) of Article 39 says that the State shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and clause (*c*) of that Article says that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These two provisions lay down a particular political philosophy. They in conjunction with some other provisions of the Constitution direct the State to build a Welfare State.

712. No one can deny the importance of the Directive Principles. The Fundamental Rights and the Directive Principles constitute the 'conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense.

713. Part IV of the Constitution is designed to bring about the special and economic revolution that remained to be fulfilled after independence. The aim of the Constitution is not to guarantee certain liberties to only a few of the citizens but for all. The Constitution visualizes our society as a whole and contemplates that every member of the society should participate in the freedoms guaranteed. To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. A society like ours steeped in poverty and ignorance cannot realize the benefit of human rights without satisfying the minium economic needs of every citizen of this country. Any Government which fails to fulfil the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitments.

714. Equally, the danger to democracy by an over emphasis on duty cannot be minimised. Kurt Reizler, a German Scholar, from his experience of the tragedy of the Nazi Germany warned:

> "If..... ..these duties of man should be duties towards the 'public welfare' of the 'society' and the State, and rights are made conditional on the fulfilment of these duties, the duties will uproot the rights. The rights will wither away.........(the) State can use the allegedly unfulfilled duties to shove aside the rights—Any Bill of Rights that makes the rights conditional on duties towards society or the State, however strong its emphasis on human dignity, freedom, God or whatever else, can be accepted by any totalitarian leader. He will enforce the duties while disregarding the right."

715. Indeed the balancing process between the individual rights and the social needs is a delicate one. This is primarily the responsibility of the "State" and in the ultimate analysis of the courts as interpreters of the Constitution and the laws.

716. Our founding fathers were satisfied that there is no anti-thesis between the Fundamental Rights and the Directive Principles. One supplements the other. The Directives lay down the end to be achieved and Part III prescribes the means through which the goal is to be reached. Our Constitution does not subscribe to the theory that end justifies the means adopted. The Counsel for the petitioners urged that the Fundamental Rights are not the cause of our failure to implement the Directive Principles. According to him, it is not the Constitution that has failed us; but we have failed to rise up its expectations. He urged that the attack against Fundamental Rights is merely an alibi and an attempt to find a scapegoat on the part of those who were unable or unwilling to implement the Directives. These allegations are denied on behalf of the Union and the States. It was urged on their behalf that interpretations placed by the court on some of the Articles in Part III of the Constitution have placed impediments in the way of the States, in implementing the Directives. These controversies are not capable of being decided by courts.

717. There is no doubt that the power conferred under Article 31-C, if interpreted in the manner contended on behalf of the Union and the States would result in denuding substantially the contents of the right to equality, the right to the seven freedoms guaranteed under Article 19 and the right to get some reasonable return by the person whose property is taken for public purpose. Unlike Article 31-A, Article 31-C is not confined to some particular subjects. It can take in a very wide area of human activities. The power conferred under it, is an arbitrary power. It is capable of being used for collateral purposes. It can be used to stifle the freedom of speech, freedom to assemble peaceably, freedom to move freely throughout India, freedom to reside and settle in any part of India, freedom to acquire, hold and dispose of property and freedom to practise any profession or carry on any occupation, trade or business. The power conferred under that provision is a blanket power. Even a small majority in a legislature can use that power to truncate or even destroy democracy. That power can be used to weaken the unity and integrity of this country. That Article is wholly out of tune with our

Constitution. Its implications are manifold There is force in the contention of the petitioners that this Article has the potentiality of shaking the very foundation of our Constitution.

718. What is the nature of the power conferred under Article 31-C? It is claimed to have empowered Parliament and the State Legislatures to enact laws pro tanto abrogating Articles 14, 19 and 31. A power to take away directly or indirectly a right guaranteed or a duty imposed under a Constitution, by an ordinary, law, is a power to pro tanto abrogate the Constitution. If the Legislature is empowered to amend the Constitution by ordinary legislative procedure, any law enacted by it, even if it does not purport to amend the Constitution, but all the same, is inconsistent with one or more of the provisions of the Constitution has the effect of abrogating the Constitution to the extent of inconsistency. That position is clear from the judgment of the Judical Committee in *McCawley* v. *The King*.[98] In other words, the power conferred under that Article is a power to amend the Constitution in certain essential respects while enacting Legislations coming within the purview of that Article. It is a power not merely to abridge but even to take away the rights guaranteed under Articles 14, 19 and 31 by ordinary law. Further that power is conferred not only on the Parliament but also on the State Legislatures.

719. Article 368 specifically provides that amendment of the Constitution can be done only in the manner provided therein. It is true that there are provisions in the Constitution under which the Parliament can amend some parts of the Constitution by ordinary law—see Articles 2 to 4, Article 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. But these provisions clearly provide that the laws enacted under those provisions "are not to be deemed as amendments to the Constitution for the purpose of Article 368". There are also some transitional provisions in the Constitution which can be changed by the Parliament by law. Leaving aside for separate consideration Article 31-A, which was first introduced by the 1st Amendment Act, 1951, there is no provision in the Constitution apart from Article 31(4) which permitted the State Legislature to enact laws contravening one or more of the provisions in Part III. Articles 31(4) relates to Legislations pending before the State Legislatures at the time the Constitution came into force. Their scope was known to the Constitution-makers. That provision was enacted to protect certain Zamindari Abolition laws which were on the anvil. But it must be remembered that the original provisions in the Constitution were not controlled by Article 368. That Article is as much a creature of the Constitution as the other Articles are. The form and manner prescribed in Article 368 did not govern the procedure of the Constituent Assembly. The mandates contained in Article 368 are applicable only to the amendments made to the Constitution. The power to amend the Constitution was exclusively given to the Parliament and to no other body. The manner of exercising that power is clearly prescribed. Article 31-C gives a very large power to the State Legislatures as well as to Parliament to pro tanto amend the Constitution by enacting laws coming within its ambit. To put it differently Article 31-C permits the State Legislatures and the Parliament to enact Constitution—breaking laws by a simple majority vote of the members present and voting, if the rule regarding quorum is satisfied.

720. It cannot be said that Article 31-C is similar to Articles 4, 169, Paragraph 7 of Schedule V and Paragraph 21 of Schedule VI. Each one of those Articles makes it clear that the laws passed under those Articles are not to be deemed to be an amendment of the Constitution for the purpose of Article 368. Those laws cannot affect the basic features of the Constitution. They operates within narrow fields.

---

[98] 1920 AC 691.

721. The learned Advocate-General of Maharashtra contended that Article 31-C lifts the ban placed on the State Legislatures and Parliament under Articles 14, 19 and 31. It is true that there are several provisions in the Constitution which lift the ban placed by one or the other Article of the Constitution on the legislative power of the State Legislatures and Parliament, e.g. Articles 15(4), 16(3), 16(4), 16(5), 19(2) to 19(6), 22(3), 22(6), 23(2), 28(2), 31(4), 31(6) etc. Each one of these Articles lifts the limitations placed on the legislative power of the Legislatures by one or more of the provisions of the Constitution particularly those contained in Part III. But when the limitation is so lifted, there will be no conflict between the law enacted and Article 13. In such a situation, there is no occasion for providing that the law enacted will not be deemed to be void notwithstanding anything contained in Article 13. The laws made under the provisions set out earlier cannot in their very nature take away any of the fundamental features of the Constitution. They can merely modify one or other of those features. Article 31-C proceeds on the basis that the laws enacted under that Article are in conflict with Article 13 and are prima facie void. Otherwise there was no purpose in providing in that Article "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes or abridges any rights conferred by Article 14, Article 19 or Article 31..........." Hence the contention that limitations imposed by Articles 14, 19 and 31 on legislative power of the Union and the States are lifted to the extent provided in Article 31-C cannot be accepted.

722. It is true that there is some similarity between the laws made under Article 31-A and those made under Article 31-C. The scope of the latter article is much wider than that of the former. The character of the laws made under both those Articles is somewhat similar. It was urged that if laws made under Article 31-A, without more, are valid even if they take away or abridge the rights conferred under Articles 14, 19 and 31, for the same reason, laws made under Article 31-C must also be held valid. It was contended, now that this Court has upheld the validity of Article 31-A, we should also upheld the validity of Article 31-C. In that connection, reliance was placed on the following observations of Brandies, J. of the United States Supreme Court in *Lesser* v. *Garnett*[99]:

> "This Amendment (19th Amendment) is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid......has been recognised and acted upon for half a century... The suggestion that the 15th was incorporated in the Constitution not in accordance with law, but practically as a war measure which has been validated by acquiesence cannot be entertained."

723. These observations do not lay down any principle of law. The validity of the 19th Amendment was upheld on various grounds and not merely because the 15th amendment was upheld.

[99] 66 L Ed p. 595 (511): 258 US 13.

724. The laws enacted under Article 31-A by their very nature can hardly abrogate the rights embodied in Articles 14, 19 and 31. Those laws can encroach upon the rights guaranteed under Articles 14, 19 and 31 only to the extent necessary for giving effect to them. The laws made must be those made under the topics of legislation mentioned in Article 31-A. Hence the encroachment of the rights guaranteed under Articles 14, 19 and 31 must necessarily be incidental. If the encroachment is found to be excessive, the same can be struck down. In this connection reference may be usefully made to the decision of this Court in *Akadasi Padhan* v. *State of Orissa*.[1] Therein the validity of a provision of a statute enacted under Article 19(6)(*ii*) i.e., law providing for State monopoly in Kendu Leaves, came up for consideration. The question for decision before the court was whether that law can unreasonably encroach upon the right guaranteed under Article 19(1)(*g*). That question was answered by Gajendragadkar, J. (as he then was) speaking for the court, thus:

> " 'A law relating to' a State monopoly cannot, in the context include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the later part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly they do not fall under the said part and their validity must be judged under the first part of Article 19(6). In other words, the effect of the amendment made in Article 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the larter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6)."

725. The same principle was reiterated by the full Court in the *Bank Nationalisation case* (supra).

726. As far back as in 1951 this Court ruled in *State of Bombay and Another* v. *F. N. Balsara*[2] that merely because law was enacted to implement one of the Directive Principles, the same cannot with impunity encroach upon the Fundamental Rights. The ratio of *Akadasi Padhan's case* (supra), would be equally applicable in respect of the laws made under Article 31-A which speaks of the "law providing for the" topics mentioned therein. But that ratio cannot be effectively applied when we come to laws made under Article 31-C. The reach of Article 31-C is very wide. It is possible to fit into the scheme of that article almost any economic and social legislation. Further, the Court cannot go into the question whether the laws enacted do give effect to the policy set out in Article 39(*b*) and (*c*). We were told on behalf of the Union and the States that it is open to the courts to examine whether there is a nexus between the laws made under Article 31-C and Article 39(*b*) and (*c*) and all that the courts are precluded from examining is the effectiveness to the law in achieving the intended purpose. But, such a power in its very nature is tenuous. There can be few laws which can be held to have no nexus with Article 39(*b*) and (*c*). At any rate, most laws may be given the appearance of aiming to achieve the objectives mentioned in Article 39(*b*) and (*c*). Once that facade is projected, the laws made can proceed to destroy the very foundation of our Constitution. Encroachment of valuable constitutional guarantees generally begins imperceptibly and is made with the best of intentions but, once that attempt is successful further encroachments follow as a matter of course, not perhaps with any evil motives, and may be, out of strong convictions regarding the righteousness of the course adopted and the objectives intended to be achieved but they may all the same be wholly unconstitutional. Lord Atkin observed in *Proprietary Articles Traders Association and Others* v. *Attorney-General for Canada and Others* :[3]

---

[1] 1963 Supp 2 SCR 691: AIR 1963 SC 1047: (1964) 2 SCJ 37.

[2] 1951 SCR 682: AIR 1951 SC 318: 1951 SCJ 478: 52 Cri LJ 1361.

> "Both the Act and the sections have a legislative history which is relevant to the discussion. Their Lordship entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment."

727. The observation of Lord Atkin "nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment" is extremely opposite for our present purpose. The First Amendment Act permitted enactment of Constitution breaking laws in respect of one subject; the Fourth Amendment Act enlarged that field and permitted the Legislatures to make laws ignoring Articles 14, 19 and 31 in respect of five subjects. Now the Twenty-Fifth Amendment has finally crossed the boundary.

728. It cannot be said that under Article 31-C Parliament merely delegated its own amending power to State Legislatures and such a delegating is valid. The power conferred on Parliament under Article 368 in its very nature is one that cannot be delegated. It is a special power to be exclusively exercised by Parliament and that in the manner prescribed in Article 368. The State Legislatures are not institutions subordinate to Parliament. Parliament as well as State Legislatures in their respective allocated fields are supreme. Parliament cannot delegate its legislative powers much less the amending power—to the State Legislatures. The question whether the legislatures can confer power on some other independent legislative body to exercise its legislative power come up for consideration before the Judicial Committee in *re The Initiative and Referendum Act*.[4] Therein Viscount Haldane, speaking for the Board observed :

> "Section 92 of the Act of 1897 (British North American Act) entrusts the legislative power in a Province to its legislature and to that legislature only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done in *Hodge* v. *The Queen*[5] the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to Tavernes; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the Constitutional questions which thus arise."

---

[3] 1931 AC 311 at 317.
[4] 1919 AC 935 at 945 (PC).
[5] (1883) 9 AC 117.

In *Queen* v. *Burah*,[6] the Judicial Committee observed:

> "Their Lordships agree that the Governor-General-in-Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Councils' Act."

729. We respectfully agree with these observations. From these observations it follows that Parliament was incompetent to create a new power—a power to ignore some of the provisions of the Constitution—and endow the same on the State Legislatures. That power was exclusively conferred on Parliament so that the unity and integrity of this country may not be jeopardised by parochial considerations. The Constitution-makers were evidently of the opinion that the sovereignty of the country, the democratic character of the polity, and the individual liberties, etc., would be better safeguarded if the amending power is exclusively left in the hands of the Parliament. This exclusive conferment of amending power on the Parliament is one of the basic features of the Constitution and the same cannot be violated directly or indirectly. Article 31-A made a small dent on this feature and that went unnoticed. That provision is now protected by the principle of stare decisis. Public interest will suffer if we go back on these decisions and take away the protection given to many statutes. Now, to use the words of Lord Atkin in the *Proprietary Articles Traders Association's case* (supra), the 'boundary line has been crossed' and a challenge to the very basic conceptions of the Constitution is passed. Hence the neglect or avoidance of the question in previous cases cannot be accepted as a sound argument.

730. In *Queen* v. *Kirby and Others*[7] Dixon, C. J., observed:

> "These cases, and perhaps other example exist, do no doubt add to the weight of the general considerations arising from lapse of time, the neglect or avoidance of the question in previous cases and the very evident desirability of leaving undisturbed assumptions that have been accepted as to the validity of the provisions in question. At the same time, the Court is not entitled to place very great reliance upon the fact that, in cases, before it where occasions might have been made to raise the question for argument and decision, this was not done by any member of this Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly. Undesirable as it is that doubtful questions of validity should go by default, the fact is that, the court usually acts upon the presumption of validity until the law is specifically challenged."

731. Similar was the view expressed by Viscount Simonds speaking for the Judicial Committee in *Attorney-General of Common Wealth of Australia* v. *The Queen and Others*.[8]

> "It is therefore asked and no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate unions. Why in *Alexander's case* (1918) 25 CLR 434, itself was no challenge made? How came it that in a series of cases, which are enumerated in the majority and the dissentient judgments it was assumed without question that the provisions now impugned were valid?

---

[6] (1878) 5 IA 178 at 194.

[7] (1956) 94 CLR 295.

[8] 95 CLR 529 at 547.

It is clear from the majority judgment that the learned Chief Justice and the Judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the Constitution the validity of the impugned provision could not be sustained. Whether the result would have been different if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption it is not for their Lordships to say. Upon a question of the applicability of the doctrine of stare dicisis to matters of far-reaching constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises. Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so far a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression, in the appropriate judgment."

732-733. The contention that Article 31-C may be considered as an amendment of Article 368 is not tenable. It does not purport to be so. That article does not find a place in Part XX of the Constitution. It is not shown as a proviso to Article 368, the only article which deals with the amendment of the Constitution as such. Article 31-C does not say that the powers conferred under that Article are available "notwithstanding anything contained in Article 368" or "notwithstanding any thing in this Constitution". There is no basis for holding that the Parliament intended that Article 31-C should operate as an amendment of Article 368. We have earlier come to the conclusion that the State Legislatures cannot be invested with the power to amend the Constitution.

734. If the purpose of Article 31-C is to secure for the Government, the control of means of production in certain economic spheres exclusively or otherwise, the same can be achieved by the exercise of legislative power under Article 31(2) or under Article 31(2), read with Article 19(6)(*ii*). If on the other hand, the object is to reduce the existing economic disparity in the country, that object can be achieved by exercising the various powers conferred on the legislatures under the Constitution, in particular by the exercise of the power to tax, a power of the largest amplitude. The power can be exercised without discriminating against any section of the people. One of the basic underlying principles of our Constitution is that every governmental power, which includes both the power of the executives as well as of the legislatures, must be so exercised as to give no room for legitimate complaint, that it was exercised with an evil eye or an uneven hand.

735. For the reasons mentioned above, we hold that Article 31-C permits the destruction of some of the basic features of our Constitution and consequently, it is void.

736. Lastly, we come to the validity of the 29th Amendment Act, 1972. Contentions relating to the 29th Amendment Act of the Constitution lie within narrower limits. The only plea taken was that if any of the provisions in the two Acts included in the IXth Schedule to the Constitution by means of the 29th Amendment Act does not satisfy the requirements of Article 31-A(1)(*a*), the said provision does not get the protection of Article 31-B.

737. As a result of the 29th Amendment Act, the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 33 of 1969) and Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971) were added as Items 65 and 66 in the Ninth Schedule of the Constitution. The Ninth Schedule is an appendage to Article 31-B, which says:

> "Without prejudice to the generality of the provisions contained in Article 31-A none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this Part and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and regulations shall subject to the power of any competent legislature to repeal or amend it, continue in force."

738. The learned Counsel for the petitioners did not challenge the validity of Article 31-B. Its validity has been accepted in a number of cases decided by this Court. His only contention was that before any Act or any provision in an Act, included in the IXth Schedule can get the protection of Article 31-B, the Act or the provision in question must satisfy the requirements of one or the other of the provisions in Article 31-A. For this contention of his, he relied on the opening words of Article 31-B namely "without prejudice to the generality of the provisions contained in Article 31-A". He urged that, if Article 31-B had been an independent provision having no connection whatsoever with Article 31-A as contended on behalf of the contesting respondents, there was no occasion for using the words referred to earlier in Article 31-B. He also attempted to trace the history of Articles 31-A and 31-B and establish that there is link between those two articles. Though there is some force in those contentions, the question of law raised is no more *res integra*. It is concluded by a series of decisions of this Court and we see no justification to reopen that question.

739. In *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others*.[9] a contention similar to that advanced by Mr. Palkhivala was advanced by Mr. Somayya. That contention was rejected by Patanjali Sastri, C. J., speaking for the Court with these observations:

> "Mr. Somayya, however, submitted that the opening words of Article 31-B, namely 'without prejudice to the generality of the provisions contained in Article 31-A' showed that the mention of particular statutes in Article 31-B read with the IXth Schedule was only illustrative, and that, accordingly, Article 31-B could not be wider in scope. Reliance was placed in support of this argument upon the decision of the Privy Council in *Sibnath Banerji's case*, 1945 FCR 195. I cannot agree with that view. There is nothing in Article 31-B to indicate that the specific intention of certain statutes was only intended to illustrate the application of the general words of Article 31-A. The opening words of Article 31-B are only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of 'estates'."

740. In *Visweshwar Rao* v. *The State of Madhya Pradesh*,[10] Mahajan, J.,

---

[9] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 354.

[10] 1952 SCR 1020: AIR 1952 SC 252, 296: 1952 SCJ 427.

(as he then was) reiterated the same view. He observed:

> "It was contended that Article 31-B was merely illustrative of the rule stated in Article 31-A and if Article 31-A had no application, that article also should be left out of consideration…………
>
> On the basis of the similarity of the language in the opening part of Article 31-B with that of sub-section (2) of Section 2 of the Defence of India Act "without prejudice to the generality of the provisions contained in Article 31-A", it was urged that Article 31-B was merely illustrative of Article 31-A and as the latter was limited in its application to estates as defined therein, Article 31-B was also so limited. In my opinion, the observations in *Sibnath Banerjee's case* (supra) far from supporting the contention raised, negatives it. Article 31-B specifically validates certain Acts mentioned in the Schedule despite the provisions of Article 31-A, but stands independent of it. The impugned Acts in this situation qua the acquisition of the eight malguzari villages cannot be questioned on the ground that it cantravenes the provisions of Article 31(2) of the Constitution or any of the other provisions of Part III."

741. A similar view was expressed by this Court in *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant. Thana.*[11] Therein Subba Rao, J. (as he then was) speaking for the Court observed thus:

> "The learned Attorney-General contended that Article 31-A and Article 31-B should be read together and that if so read Article 31-B would only illustrate cases that would otherwise fall under Article 31-A and, therefore, the same construction as put upon Article 31-B should also apply to Article 31-A of the Constitution. This construction was sought to be based upon the opening words of Article 31-B, namely 'without prejudice to the generality of the provisions contained in Article 31-A'. We find it difficult to accept this argument. The words 'without prejudice to the generality of the provisions' indicate that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Article 31-A of the Constitution. If every Act in the 9th Schedule would be covered by Article 31-A, this article would become redundant. Indeed, some of the Acts mentioned therein, namely, Items 14 to 20 and many other Acts added to the 9th Schedule, do not appear to relate to estates as defined in Article 31-A(2) of the Constitution. We, therefore, held that Article 31-B is not governed by Article 31-A and that Article 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution……………"

742. Several other decisions of this Court proceed on the basis that Article 31-B is independent of Article 31-A. It is too late in the day to reopen that question. Whether the Acts which were brought into the IXth Schedule by the 29th Amendment Act or any provision in any of them abrogate any of the basic elements or essential features of the Constitution can be examined when the validity of those Acts is gone into.

743. For the foregoing reasons, we reject the contention of the petitioners that before an Act can be included in the IXth Schedule, it must satisfy the requirements of Article 31-A.

744. In the result we hold:

(1) The power to amend the Constitution under Article 368 as it stood

---

[11] (1965) 1 SCR 636: AIR 1965 SC 1096.

before its amendment empowered the Parliament by following the form and manner laid down in that article, to amend each and every Article and each and every part of the Constitution.

(2) The expression “law” in Article 13(2) even before Article 13 was amended by the 24th Amendment Act, did not include amendments to the Constitution.

(3) Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.

(4) The 24th Amendment Act did not enlarge the amending power of the Parliament. It merely made explicit what was implicit in the original article. Hence it is valid.

(5)(A) The newly substituted Article 31(2) does not destroy the right to property because—

(*i*) the fixation of “amount” under that Article should have reasonable relationship with the value of the property acquired or requisitioned;

(*ii*) the principles laid down must be relevant for the purpose of arriving at the “amount” payable in respect of the property acquired or requisitioned;

(*iii*) the “amount” fixed should not be illusory; and

(*iv*) the same should not be fixed arbitrarily.

5(B) The question whether the “amount” in question has been fixed arbitrarily or the same is illusory or the principles laid down for the determination of the same are relevant to the subject-matter of acquisition or requisition at about the time when the property in question is acquired or requisitioned are open to judicial review. But it is no more open to the court to consider whether the “amount” fixed or to be determined on the basis of the principles laid down is adequate.

(6) Clause 2(*b*) of the 25th Amendment Act which incorporated Article 31(2-B) is also vaild as it did not damage or destory any essential features of the Constitution.

(7) Clause (3) of the 25th Amendment Act which introduced into the Constitution, Article 31-C is invalid for two reasons, i.e.: (1) it was beyond the amending power of the Parliament in so far as amendment in question permits destruction of several basic elements or fundamental features of the Constitution and (2) it empowers the Parliament and State Legislatures to *pro tanto* amend certain human freedoms guaranteed to the citizens by the exercise of their ordinary legislative power.

(8) The 29th Amendment Act is valid but whether the Acts which were brought into the IXth Schedule by that Amendment or any provision in any of them abrogate any of the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is gone into.

745. In the circumstances of the cases we direct the parties to bear their own costs in these cases uptil this stage.

Ray, J.—The validity of the Constitution 24th, 25th and 29th Amendment Acts is challenged The Constitution 24th Amendment Act amended Article 368. Article 368 in the unamended forms speaks of "Amendment of this Constitution" and how the Constitution shall stand amended. The Constitution 24th Amendment Act enacts that Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in that Article. The other part of the amendment is that nothing in Article 13 shall apply to any amendment under Article 368. The Constitution 25th Amendment Act has amended Article 31(2) and also Article 31(2-A). The effect of these two amendments with regard to Articles 31(2) and 31(2-A) is two-fold. First, no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for an amount which may be fixed by law or which may be determined in accordance with such principles. Secondly, nothing in Article 19(1)(*f*) shall affect any law as is referred to in Article 31(2). The second part of the Constitution 25th Amendment Act is introduction of Article 31-C which enacts that notwithstanding anything contained in Article 13 no law giving effect to the policy of the State towards securing principles prescribed in clauses (*b*) and (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. By the Constitution 29th Amendment Act, the Kerala Land Reforms Amendment Act, 1969 and the Kerala Land Reforms Amendment Act, 1971 have been introduced into the Ninth Schedule of the Constitution.

747. The principal question which falls for determination is whether the power to amend is under any express limitation of Article 13(2). Another question is whether there are implied and inherent limitations on the power of amendment. Can there be any implied or inherent limitations in the face of any express power of amendment without any exception? Questions have been raised that essential features of the Constitution cannot be amended. Does the Constitution admit of distinction between essential and non-essential features? Who is to determine what the essential features are? Who is the authority to pronounce as to what features are essential? The pre-eminent question is whether the power of amendment is to be curtailed or restricted, though the Constitution does not contain any exception to the power of amendment. The people gave the Constitution to the people. The people gave the power of amendment to Parliament. Democracy proceeds on the faith and capacity of the people to elect their representatives and faith in the representatives to represent the people. Throughout the history of mankind if any motive power has been more potent than another it is that of faith in themselves. The ideal of faith in ourself is of the greatest help to us. Grote, the historian of Greece said that the diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensible condition of a government at once free and peaceable. By constitutional morality Grote meant a paramount reverence for the forms of the Constitution, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of opponents than in his own. The question is "He that planted the ear, shall he nor hear? or he that made the eye, shall he no see".

748. The real question is whether there is any power to amend the Constitution and if so whether there is any limitation on the power. The answer to this question depends on these considerations. First, what is the correct ratio and effect of the decision in *I. C. Golak Nath & Ors.* v. *State of Punjab & Anr.*[12] Second, should that ratio be upheld. Third, is there any limitation on the power to amend the Constitution. Fourth, was the 24th Amendment validly enacted. If it was, is there any inherent and implied limitation on that power under Article 368 as amended.

749. The scope and power under Article 368 as it stood prior to the Constitution (24th) Amendment Act, to amend the Constitution falls for consideration.

750. Two principal questions arise. First, is the Constitution as well as an amendment to the Constitution law within the meaning of Article 13(2). Second, is there any implied and inherent limitation on the power of amendment apart from Article 13(2).

751. Mr. Palkhivala contends that the unamended Article 368 was subject to Article 13(2). It is said that amendment of the Constitution is law, and, therefore, any law which contravenes fundamental rights is void. It is also said that Article 368 does not prevail over or override Article 13. The four bars under Article 13 are said to be these. The bar is imposed against the State, that is to say the totality of all the forces of the State. Second, all categories of law are covered by the bar, whether they are constitutional amendments or bye-laws or executive Orders and Notifications. Third, all laws in force under Article 372 and all laws to be brought into force at any future date are brought within the scope of this bar. Fourth, the effect of the bar is to render the law void.

752. Mr. Palkhivala said that the Preamble makes it clear that the object of the Constitution is to secure basic human freedoms, and this guarantee will be meaningless if the Legislature against whom the guarantee is to operate is at liberty to abrogate the guarantees. It is said that law is comprehensive enough to include both ordinary law and constitutional law. The various forms of oath in the Third Schedule of the Constitution refer to "constitution as by law established". It is, therefore, submitted by the petitioner that the Constitution itself was originally established by law and every amendment has likewise to be established by law in order to take effect. It is emphasised that the constitutional amendment is a law, and, therefore, the word "law" in Article 13(2) includes constitutional amendments.

753. The Attorney-General and Mr. Seervai said that the Constitution is the supreme higher law. An amendment to the Constitution is in exercise of constituent power. The amending power is not a legislative power. Law in Article 13(2) embodies the doctrine of ultra vires to render void any law enacted under the Constitution.

754. This Court in *Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*,[13] and *Sajjan Singh* v. *State of Rajasthan*,[14] examined the power to amend the Constitution.

755. In *Sankari Prasad's case* (supra) the Constitution First Amendment Act was challenged. The principal contention was that the First Amendment insofar as it purported to take away or abridge the rights conferred by

---

[12] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

[13] (1952) SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[14] (1965) 1 SCR 983: AIR 1965 SC 845: (1965) 1 SCJ 377.

Part III of the Constitution fell within the prohibition of Article 13(2) of the Constitution.

756. The unanimous view of this Court in *Sankari Prasad's case* (supra) was that although law must ordinarily include constitutional law there is a clear demarcation between ordinary law which is made in exercise of legislative power and constitutional law which is made in exercise of constituent power. In the absence of a clear indication to the contrary it is difficult to hold that the framers of the Constitution intended to make the fundamental rights immune of constitutional amendment. The terms of Article 368 are general to empower Parliament to amend the Constitution without any exception. Article 13(2) construed in the context of Article 13 means that law in Article 13(2) would be relateable to exercise of ordinary legislative power and not amendment to the Constitution.

757. The Constitution Fourth Amendment Act came into existence on 5th October, 1963. The Constitution Seventeenth Amendment Act came into force on 20th June, 1964. But the Seventeenth Amendment Act Article 31-A, clause (1) was amended by inserting one more proviso. A fresh sub-clause (*a*) was substituted for original sub-clause (*a*) of clause (2) of Article 31 retrospectively. Fourty-four Acts were added in the Ninth Schedule. The validity of the Seventeenth Amendment was challenged before this Court in *Sajjan Singh's case* (supra).

758. The main contention in *Sajjan Singh case* (supra) was that the power prescribed by Article 226 was likely to be affected by the Seventeenth Amendment, and, therefore, it was necessary that the special procedure laid down in the proviso to Article 368 should have been followed. The Seventeenth Amendment Act was said to be invalid because that procedure was not followed.

759. The majority view of this Court in *Sajjan Singh case* (supra) was that Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution. The word "law" in Article 13(2) was held not to take in the Constitution Amendment Acts passed under Article 368. It was also said that fundamental rights in Article 19 could be regulated as specified in clauses (2) to (6) and, therefore, it could not be said to have been assumed by the Constitution makers that fundamental rights were static and incapable of expansion. It was said that the concept of public interest and other important considerations which are the basis of clauses (2) to (6) in Article 19 "may change and may even expand". The majority view said that "The Constitution-makers knew that Parliament could be competent to make amendments in those rights (meaning thereby fundamental rights) so as to meet the challenge of the problem which may arise in the course of socio-economic progress and the development of the country".

760. The minority view in *Sajjan Singh's case* (supra) doubted the correctness of the unanimous view in *Sankari Prasaa's cause* (supra). The doubt was on a question as to whether fundamental rights could be abridged by exercise of power under Article 368. The minority view in *Sajjan Singh's case* (supra) was that the rights of society are made paramount and are placed above those of the individual. But the minority view was also that though fundamental rights could be restricted under clauses (2) to (6) of Article 19 there could be no "removal or *debilitation*" of such rights.

761. In *Golak Nath's case* (supra) the Punjab Security of Land Tenures Act, 1953 was challenged as violative of fundamental rights and as not being protected by the Constitution First Amendment Act, 1951, the Constitution Fourth Amendment Act, 1955 and the Constitution Seventeenth Amendment Act, 1964. The validity of the Mysore Land Reforms Act, 1962 as amended by Act 14 of 1965 was also challenged on the same grounds. The Punjab Act and the Mysore Act were included in the Ninth Schedule. It was common case that if the Seventeenth Amendment Act adding the Punjab Act and the Mysore Act in the Ninth Schedule was valid the two Acts could not be impugned on any ground.

762. The majority decision of this Court in *Golak Nath's case* (supra) was that an amendment of the Constitution was law within the meaning of Article 13(2). There were two reasonings in the majority view arriving at the same conclusion. The majority view where Subba Rao, C.J., spoke was as follows: The power to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368. Article 368 deals only with procedure. Amendment is a legislative process. Amendment is law within the meaning of Article 13. Therefore, if an amendment takes away or abridges rights conferred by Part III of the Constitution it is void. The Constitution First Amendment Act, the Constitution Fourth Amendment Act and the Constitution Seventeenth Amendment Act abridged the scope of fundamental rights. On the basis of earlier decisions of this Court the Constitution Amendment Acts were declared to be valid. On the application of the doctrine of prospective overruling the amendments will continue to be valid. Parliament will have no power from the date of this decision [meaning thereby the decision in *Golak Nath's case* (supra)] to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights. The Constitution Seventeenth Amendment Act holds the field. Therefore, the Punjab Act and the Mysore Act cannot be questioned.

763. The concurring majority view of Hidayatullah, J., was this: The fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights. The First, the Fourth and the Seventh Amendment Acts being Part of the Constitution by acquiescence for a long time cannot be challenged. These Constitution Amendment Acts contain authority for the Seventeenth Amendment Act. Any further inroad into fundamental rights as they exist on the date of the decision will be illegal and unconstitutional unless it complies with Part III in general and Article 13(2) in particular. The constituent body will have to be convened for abridging or taking away fundamental rights. The Punjab Act and the Mysore Act are valid not because they are included in the Ninth Schedule of the Constitution but because they are protected by Article 31-A and the assent of the President.

764. The two views forming the majority arrived at the same conclusion that an amendment of the Constitution being law within the meaning of Article 13(2) would be unconstitutional if such an amendment abridged any fundamental right. The leading majority view did not express any final opinion as to whether fundamental rights could be abridged by Parliament exercising its residuary power and calling a Constituent Assembly "for making a new Constitution or radically changing it". The concurring majority view held that the fundamental rights could be abridged by suitably amending Article 368 to convoke Constituent Assembly. The concurring majority view was that a Constituent Assembly could be called by passing a law under Entry 97 of List I and then that Assembly would be able to abridge or take away fundamental rights.

765. The minority view of five learned Judges expressed in three judgments as against the majority view of six learned Judges in *Golak Nath's case* (supra) was this.

766. Wanchoo, J., spoke for himself and two concurring learned Judges as follows. Article 368 contains both the power and the procedure for amendment of the Constitution. It is incomprehensible that the residuary power of Parliament will apply to amendment of the Constitution when the procedure for amendment speaks of amendment by ratification by the States. When an entire part of the Constitution is devoted to amendment it will be more appropriate to read Article 368 as containing the power to amend because there is no specific mention of amendment in Article 348 or in any Entry of List I. The Constitution is the fundamental law and without express power to affect change legislative power cannot effect any change in the Constitution. Legislative Acts are passed under the power conferred by the Constitution. Article 245 which gives power to make law for the whole or any part of India is subject to the provisions of the Constitution. If, however, power to amend is in Article 248, read with the residuary Entry in List I that power is to be exercised subject to the Constitution and it cannot change the Constitution which is the fundamental law. It is because of the difference between the fundamental law and the legislative power under the Constitution that the power to amend cannot be located in the Residuary Entry which is law-making power under the Constitution.

767. Article 368 confers power on Parliament subject to the procedure provided therein for amendment of any provision of the Constitution. It is impossible to introduce in the concept of amendment, any idea of improvement. The word "amendment" must be given its full meaning. This means that by amendment an existing Constitution or law can be changed. This change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether. An amendment of the Constitution is not an ordinary law made under the powers conferred under Chapter I of Part XI of the Constitution, and, therefore, it cannot be subject to Article 13 (2). It is strange that the power conferred by Article 368 will be limited by putting an interpretation on the word "law" in Article 13 (2) which will include constitutional law also. The possibility of the abuse of any power has no relevance in considering the question about the existence of the power itself. The power of amendment is the safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary.

768. The two other supporting minority views were these. Bachawat, J., arrived at these conclusions. No limitation on the amending power can be gathered from the language of Article 368. Therefore, each and every part of the Constitution may be amended under Article 368. The distinction between the Constitution and the laws is so fundamental that the Constitution is not regarded as a law or a legislative Act. It is because a Constitution Amendment Act can amend the Constitution that it is not a law and Article 368 avoids all reference to law-making by Parliament. As soon as a Bill is passed in conformity with Article 368 the Constitution stands amended in accordance with the terms of the Bill. Amendment or change in certain articles does not mean necessarily improvement.

769. Ramaswami, J., expressed these views. The definition of law in Article 13(3) does not include in terms a constitutional amendment though it includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage. The language of Article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatever. If it had been intended by the Constitution makers that the fundamental rights guaranteed under Part III should be completely outside the scope of Article 368 it is reasonable to assume that they would have made an express provision to that effect. The expression "fundamental" does not lift the fundamental rights above the Constitution itself. In a matter of constitutional amendment it is not permissible to assume that there will be abuse of power and then utilise it as a test for finding out the scope of amending power.

770. The majority view in *Golak Nath's case* (supra) was that an amendment of the Constitution pursuant to Article 368 is law within the meaning of Article 13(2), and, therefore, an amendment of the Constitution abridging fundamental rights will be void. The majority view was on the basis that there was conflict between Article 13(2) and Article 368 and this basis was the result of the nature and quality of fundamental rights in the scheme of the Constitution.

771. It is, therefore, to be seen at the threshold as to whether there is any conflict between Article 13(2) and Article 368, namely, whether amendment of Constitution is law within the meaning of law in Article 13(2). Article 368 provides in clear and unambiguous terms that an amendment bill after compliance with the procedure stated therein and upon the President giving assent to such bill the Constitution shall stand amended in accordance with the terms of the bill. This constitutional mandate does not admit or provide any scope for any conflict with any other Article of the Constitution. This is the fundamental law. No other article of the Constitution has limited its scope. The moment the President gives his assent to an amendment bill the amendment becomes a part of the Constitution. There cannot be a law before the assent of the President. Therefore, the validity of any such supposed law cannot arise. An amendment of the Constitution becomes a part of the fundamental law. The legality of an amendment is no more open to attack than of the Constitution itself. The opening part of unamended Article 368, viz., "An Amendment of this Constitution may be initiated" and its concluding part before the proviso, viz., "The Constitution shall stand amended" show clearly that the whole Constitution can be amended and no part of the Constitution is excluded from the amendment. Herein lies the vital distinction between the Constitution and the ordinary law.

772. The distinction lies in the criterion of validity. The validity of an ordinary law can be questioned. When it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The validity of constitutional law cannot be justified by reference to another higher law. Every legal rule or norm owes its validity to some higher legal rule or norm. The Constitution is the basic norm. The Constitution generates its own validity. It is valid because it exists. The Constitution is binding because it is the Constitution. Any other law is binding only if and insofar as it is in conformity with the Constitution. The validity of the Constitution lies in the social fact of its acceptance by the community. The constitutional rules are themselves the basic rules of the legal system. The Constitution prevails over any other form of law not because of any provision to that effect either in the Constitution or else where but because of the underlying assumption to that effect by the community. If Parliament passes a law under any of the items in the Union List abridging a fundamental right and also provides in that law itself that it shall not be invalid notwithstanding anything in Article 13 or Part III of the Constitution, yet the law made by Parliament will be invalid to the extent of its inconsistency with Part III of the Constitution. It will be invalid because Article 13 occurs in the Constitution which is supreme. The impugned Act cannot enact that it will be valid notwithstanding the Constitution.

773. The real distinction is that Constitutional law is the source of all legal validity and is itself always valid. Ordinary law on the other hand must derive its validity from a higher legal source, which is ultimately the Constitution. Law in Article 13(2) of the Constitution could only mean that law which needs validity from a higher source and which can and ought to be regarded as invalid when it comes in conflict with higher law. It cannot possibly include a law which is self validating and which is never invalid. The definition of law in Article 13 enumerates more or less exhaustively all forms of law which need validation from higher source and which are invalid when they are in conflict with the Constitution. The definition does not mention constitutional amendment. It is because an amendment being the Constitution itself can never be invalid. An amendment is made if the procedure is complied with. Once the procedure is complied with it is a part of the Constitution.

774. The expression "law" has been used in several Articles in Part III of the Constitution. These are Articles 17, 19 clauses (2) to (6), 21, 22, 25, 26, 31, 33, 34 and 35. To illustrate, Article 17 states that untouchability is abolished and its practice in any form is forbidden. Article 17 also states that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The word "law" in Article 17 does not mean the Constitution. The Constitution leaves the matter to enforcement and punishment of law.

775. The foundation of the majority view in *Golak Nath's case* (supra) that Article 13(2) takes in constitutional law within its purview is that an amendment is a legislative process and is an exercise of legislative power. The majority relied on the decision in *McCawley* v. *The King*,[15] and the *Bribery Commisioner* v. *Padrick Ranasinghe*[16] in support of the view that there is no distinction between ordinary legislation and constitutional amendment. The basis of the unanimous decision in *Sankari Prasad's case* (supra) was on the distinction between legislative power and the constituent power. Therefore, the majority view in *Golak Nath's case* (supra) overruled the view in *Sankari Prasad's case* (supra). Article 13(2) expressly declares that law taking away or abridging the rights conferred by Part III shall be void. This principle embodies the doctrine of ultra vires in a written Constitution. The observation of Kania, C. J. in *A. K. Gopalan* v. *The State of Madras*,[17] that Article 13(2) was introduced *ex majore cautela* because even if Article 13 were not there any law abridging or taking away fundamenal rights would be void to the extent of contravention or repugnancy with fundamental rights in Part III refers to the doctrine of ultra vires which is a necessary implication of our Constitution. Therefore, there is no distinction between Article 13(2) which expressly affirms the doctrine of ultra vires and the necessary implication of the doctrine of ultra vires which has been applied to every part of our Constitution. If the express doctrine of the ultra vires prevent an amendment of Part III of the Constitution contrary to its terms, equally an amendment of other parts of the Constitution contrary to their terms would be prevented by the implied doctrine of ultra vires. The result would be that an amendment of the Constitution which contravened the terms of the existing Constitution would be void. This would result in absurdity. That is why Article 368 expressly provides for the amendment of the Constitution.

---

[15] 1920 AC 641.

[16] 1965 AC 172.

[17] 1950 SCR 88: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

776. Mr. Palkhivala on behalf of the petitioner submitted that constitution amendment was law within Article 13(2) and was void to the extent to which it contravened the fundamental rights and Article 368 did not prevail over or override Article 13 for these reasons. Reference was made to the form of oath in the Third Schedule which uses the words "Constitution as by law established". This is said to mean that our Constitution was originally established by law and, therefore, every amendment thereto was likewise to be established by law. Article 13(1) is also said to cover constitutional law because though Article 395 repealed the Indian Independence Act, 1947 and the Government of India Act, 1935 the constitutional laws of the Indian Princely States or some other constitutional laws of British India were in existence. Therefore, the word "law" in Article 13(2) will also include constitutional law. The word "law" in Article 13(2) will in its ordinary sense embrace constitutional law, and there is no reason for reading the word "law" in a restricted sense to confine it to ordinary laws. The real question is not whether there are any words of limitation in Article 368 but whether there are any words of limitation in Article 13(2). It was amplified to mean if a limitation has to be read in either of the two Articles 368 and 13(2) there is no reason why it should be read in such a way as to enable Parliament to take away or abridge fundamental rights.

777. In Article 368 the word "law" is not used at all. Consequently the language of Article 368 raises no question about the applicability of Article 13(2). It is inconceivable that constitutional laws of Indian Princely States or constitutional laws of British India exist as Constitutional laws after the coming into existance of our Constitution. Our Constitution is the only fundamental law. All other laws which continue under our Constitution are ordinary laws. The fundamental error in including amendment of the Constitution in law under Article 13(2) is by overlooking the vital difference between the constituent and the legislative powers and in wrongly equating these powers. The definition of "State" in Article 12 includes Parliament. Part V of the Constitution contains provisions relating to the powers of the three organs of the Union Government. Chapter II of Part V relates to the legislative power of Parliament. Under Article 79 Parliament is the Union Legislature provided for by the Constitution. Therefore, law in Article 13(2) must mean a law of Parliament functioning under Chapter II of Part V. It cannot mean the Constitution itself or an amendment of the Constitution. The reason is that the Constitution with its amendment is the supreme authority and the three organs of the State derive their powers from this supreme authority.

778. The word "law" when used in relation to constitutional law which is fundamental law and ordinary law is not a mere homonym. If the word "law" here is not a mere homonym then it is a mistake to think that all the instances to which it is applied must possess either a single quality or a single set of qualities in common. There is some generel test or criterion whereby the rules of the fundamental law or the rules of the system of ordinary laws are tested and identified. When the word "law" is spoken in connection with Constitutioual law it cannot have the same meaning as ordinary law.

It is not arbitrary to use the word "law" in relation to constitutional law in spite of its difference from ordinary law.

779. Mr. Palkhivala contended that constitutional laws of Princely States and of British India prior to our Constitution survived as laws in force under Article 372. Article 372 became necessary to make a provision similar to Section 292 of the Government of India Act, 1935 following the repeal of the 1935 Act and the Indian Independence Act, 1947. The purpose of Article 372 is to negative the possibility of any existing law in India being held to be no longer in force by reason of the repeal of the law authorising its enactment. A saving clause of the type of Article 372 is put in to avoid challenge to laws made under the repealed Constitution. The total volume of law in the then British India had the legal authority up to August 14, 1947 by reason of the Government of India Act, 1935. The Government of India Act, 1935 with adaptations and the Indian Independence Act, 1947 preserved the authority of those laws up to January 25, 1950. Insofar as it is indisputable that the Government of India Act, 1935 and the Indian Independence Act, 1947 were repealed, the repeal of those Acts was repeal of constitutional law represented by those Acts. By our Constitution there was a repeal of all other constitutional laws operating in our country. There was repeal of "Constitution" in Princely States.

780. A distinction arises between the provisions of a Constitution which are described as constitutional law and provisions of a statute dealing with a statute which is treated to have constitutional aspects. An example of the latter type is a statute which provides for the judicature. Mr. Seervai rightly said that the two distinct senses of constitutional law are mixed up in the contention of Mr. Palkhivala. In the first sense, constitutional law is applicable to a provision of the Constitution, and in the second sense, to a law enacted under the Constitution dealing with certain classes of subject-matter. Laws of the second class fluctuate. An amendment of the Constitution becomes a part of the Constitution itself. Mr. Seervai rightly contended that in order to show that law in Article 13(2) includes amendment of the Constitution it is also necessary to show that the expression "laws in force" in Article 13(1) includes constitution amendments or the Constitution itself. It is impossible to accept the submission that the word "law" in Article 13(2) includes the Constitution. The Constitution itself cannot include the Constitution. It is the Constitution which continues the laws in force. Therefore, law in Article 13 is law other than the Constitution and a fortiori it is other than amendment to the Constitution.

781. In non-British territory on the Constitution coming into force the Constitution of Princely States lost its character as constitutional law in the strict sense. It is in that strict sense that Wanchoo, J., rightly said in *Golak Nath's case* (supra) that on our Constitution coming into existence no other constitutional law survived. Article 393 of our Constitution says that the Constitution may be called the "Constitution of India". The Preamble recites that the People in the Constituent Assembly gave this Constitution meaning thereby the Constitution of India. Therefore, the people gave themselves no other Constitution. All other laws whatever their previous status as strict constitutional law became subordinate laws subject to the provisions of our Constitution and this position is clear from the language of Article 372.

782. In a broad sense law may include the Constitution and the law enacted by the Legislature. There is however a clear demarcation between ordinary law in exercise of legislative power and constitutional law which is made in exercise of constituent power. Therefore, a power to amend the Constitution is different from the power to amend ordinary law. It was said by Mr. Palkhivala that legislative power is power to make law and constituent power is the power to make or amend constitutional law and since law in its ordinary sense includes constitutional law the legislative power is the genus of which the constituent power is the species. The difference between legislative and constituent power in a flexible or uncontrolled Constitution is conceptual depending upon the subject-matter. A Dog Act in England is prima facie made in exercise of legislative power. The Bill of Rights was made in the exercise of constituent power as modifying the existing constitutional arrangement. But this conceptual difference does not produce different legal consequences, since the provisions of a Dog Act inconsistent with the earlier provisions of the Bill of Rights would repeal those provisions pro tanto. In a rigid or controlled Constitution the distinction between legislative power and constituent power is not only conceptual but material and vital in introducing legal consequences. In a controlled Constitution it is not correct to say that legislative power is the genus of which constituent power is the species. The question immediately arises as to what the differentia is which distinguishes that species from other species of the same genus. It would be correct to say that the law-making power is the genus of which legislative power and constituent power are the species. The differentia is found in the different procedure prescribed for the exercise of constituent power as distinguished from that prescribed for making ordinary laws. The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void, since the Constitution is the touchstone of validity and that no provision of the Constitution can be ultra vires.

783. The Legislatures constituted under our Constitution have the power to enact laws on the topics indicated in Lists I to III in the Seventh Schedule or embodied specifically in certain provisions of the Constitution. The power to enact laws carries with it the power to amend or repeal them. But these powers of legislatures do not include any power to amend the Constitution, because it is the Constituent Assembly which enacted the Constitution and the status given by Article 368 to Parliament and the State Legislatures, is the status of a Constituent Assembly. The distinction between the power to amend the Constitution and the ordinary power to enact laws is fundamental to all federal Constitutions. When Parliament is engaged in the amending process it is not legislating. It is exercising a particular power which is *sui generis* bestowed upon it by the amending clause in the Constitution. Thus an amendment of the Constitution under Article 368 is constituent law and not law within the meaning of Article 13(2) and law as defined in Article 13(3)(*a*).

784. The procedure that Bill for amendment of the Constitution has to be introduced in either House of Parliament and passed by both Houses does not alter the status of Parliament to amend the Constitution as a Constituent Assembly and does not assimilate it to that of the Union Legislature. At this stage it may be stated that in *Sankari Prasad's case* (supra) it was said that law in a general sense may include the Constitution and the procedure of amendment is assimilated to ordinary legislative procedure. Assimilation of procedure does not make both the procedures same. Nor are the two separate powers to be lost sight of. The Constituent Assembly which was summoned on December 19, 1946 to frame a Constitution was also invested after independence with legislative power. It framed the Constitution as the Constituent Assembly. It enacted ordinary laws as legislature. Under Article V of the American Constitution the Congress functions not as a legislature but as a Constituent Assembly. In Australia when a Bill for amendment has to be passed by Commonwealth Parliament and then has to be submitted to the verdict of the electorate the process is not ordinary legislative process of the Commonwealth Parliament. In our Constitution when the amendment falls within the proviso to Article 368 it requires that the amendment must be ratified by at least one half of the State Legislatures and the process is radically different from ordinary legislative procedure. The Union Legislature acting under Chapter II of Part V has no connection with the State Legislatures. Therefore, when amendment is affected under the proviso to Article 368 Parliament does not act as a Union Legislature. The feature that in the passage of the bill for amendment of the Constitution the House of Parliament has to adopt the procedure for ordinary legislation has little bearing. If the intention of the framers of the Constitution was to leave to the Union Legislature the power to effect amendments of the Constitution it would have been sufficient to insert a provision in Chapter II of Part V in that behalf without enacting a separate part and inserting a provision therein for amendment of the Constitution.

785. Under clause (*e*) of Article 368 the Article itself can be amended. Therefore, an amendment of Article 368 providing that provisions in Part III can be amended will be constitutional. If it was intended by Article 13(2) to exclude Part III altogether from the operation of Article 368 clause (*e*) would not have been enacted. The Constituent Assembly thus enacted Article 368 so that the power to amend should not be too rigid nor too flexible. Clause (*e*) of Article 368 requires an amendment to be ratified by not less than half the number of States. The title of Part XX and the opening words of Article 368 show that a provision is being made for "amendment of this Constitution" which in its ordinary sense means every part of the Constitution. This would include Article 368 itself. There is no limitation imposed upon or exception made to the amendments which can be made. It is not permissible to add to Article 368 words of limitation which are not there.

786. The initiative for an amendment of the Constitution is with Parliament and not with the States. A bill for amendment is to be introduced in either House of Parliament. Again, a bill must be passed by each House by not less than two-thirds of the members present and voting, the requisite quorum in each House being a majority of its total membership. In cases coming under the proviso the amendment must be ratified by the Legislatures of not less than half the number of States. Ordinary legislative process is very different. A bill initiating a law may be passed by majority of members present and voting at a sitting of each House and at a joint sitting of House, the quorum for the meeting of either House being one-tenth of the total members of the House.

787. The legislative procedure is prescribed in Articles 107 to 111, read with Article 100, Article 100 states "save as otherwise provided in the Constitution all questions at any sitting of either House or joint sitting shall be determined by a majority of votes of the members present and voting". Though Article 368 falls into two parts the Article is one integral whole as is clear from the words "the amendment shall also require to be ratified". The first part of Article 368 requires that a bill must be passed in each House: (1) by majority of the total membership of that House and (2) by a majority of not less than two-thirds of the members of that House present and voting. These provisions rule out a joint sitting of either House under Article 108 to resolve the disagreement between the two Houses. Again, the majority required to pass a bill in each House is not a majority of members of that House present and voting as in Article 100 but a majority of the total membership of each House and a majority of not less than two-thirds of the members of that House present and voting. These provisions are not only important safeguards when amending the Constitution, but also distinguishing features of constituent power as opposed to legislative power. Under the first part of unamended Article 368 when a bill is passed by requisite majority of each House the bill must be presented for the President's assent.

788. Parliament's power to eact laws is not dependent on State legislatures, nor can it be frustrated by a majority of State Legislatures. The provisions in the proviso to Article 368 for ratification by the Legislatures of the State constitute a radical departure from the ordinary legislative process of Parliament, State Legislative process of ratification cannot possibly be equated with ordinary legislative process. If the bill is not ratified the bill fails. If it is ratified it is to be presented to the President for his assent. If the President assents the procedure prescribed by Article 368 comes to an end the consequence prescribed comes into operation that the Constitution shall stand amended in accordance with the bill. But the result is not law, but a part of the Constitution and no court can pronounce any part of the Constitution to be invalid.

789. The exercise of the power of ratification by the State Legislatures is constituent power and not ordinary law-making power. It cannot be said that Article 368 confers constituent power under its proviso but not under the main part. If the procedure has been followed the invalidity of an amendment cannot arise.

790. The provisions in Articles 4, 169, Paragraph 7(2) of the Fifth Schedule and Paragraph 21(2) of the Sixth Schedule were referred to for the purpose of showing that the word "law" is used in those provisions relating to amendments to the Constitution. It is, therefore, said that similar result will follow in the case of all amendments. These four provisions confer on Parliament limited power of amendment. There are two features common to all these provisions. First, they confer on Parliament a power to make a law which inter alia provides for the specific class of amendments. Second, each of these provisions states that "no such law as aforesaid shall be deemed to be an amendment of the Constitution for the purpose of Article 368" The power to amend under any of these four provisions is a specific power for specific amendments and not a legislative power contained in the Legislative List or Residuary Legislative List.

791. The amendment under Article 4 follows a law providing for the formation of new States and alteration of areas, boundaries and names of existing States. It is obligatory on Parliament to make amendment of Schedules 1 and 4 it is necessary to make amendments which are supplemental, incidental and consequential. In making such a law in so far as it affects the State but not Union territory a special procedure has to be followed.

791-A. Under Article 169 which provides for the abolition or creation of a State legislative Council Parliament has power to make a necessary law on a resolution being passed by the State Legislative Assembly for such abolition or creation by a majority of the membership of Assembly and by majority of not less than two-thirds of the members present and voting. If Parliament makes such a law that law must make the necessary amendments to the Constitution.

792. Schedules 5 and 6 provide for the administration of the Scheduled and Tribal areas which are governed by Part X and not by Part XI by which the Union and the States are governed. The Schedules provide a mode of governance of those areas which is radically different from the Government of the States and the Union. Part X of the Constitution unlike Part XI is not "subject to the provisions of this Constitution". Paragraph 7 of Schedule 5 and Paragraph 21 of Schedule 6 confers on Parliament a power to amend the Schedules by law but no special procedure is prescribed for making such a law.

793. No question relating to those four provisions, however arises in the present case. In Article 368 the word "law" is not used at all. These four provisions for amendment deal with matters in respect of which it was considered desirable not to impose requirements of Article 368, and, therefore, it became necessary expressly to provide that such amendments shall not be deemed to be amendments of the Constitution for the purpose of Article 368. These four provisions indicate the distinction between the constituent power and the legislative power. If the power of amendment was located in the residuary Entry No. 97 in the Union List it would not have been necessary to grant that power of amendment again in these four provisions. These four provisions indicate that the Constitution-makers intended to confer on Parliament power to make amendments in the provisions of the Constitution and having provided for a particular procedure to be followed in respect of matters covered by those four provisions it conferred a general power on Parliament to make an amendment to the other Articles after complying with the requirements of Article 368.

794. The majority view in *Golak Nath's case* (supra) said that Parliament could call a Constituent Assembly either directly under the residuary power or pass a law under the Residuary Entry to call a Constituent Assembly for amendment of fundamental rights. Of the two views forming the majority one view did not express any opinion as to whether such a Constituent Assembly could take away or abridge fundamental rights but the other view expressed the opinion that such a Constituent Assembly could abridge fundamental rights. The majority view in *Golak Nath's case* (supra) was that Parliament is a constituted body and not a constituent body and a constituted body cannot abridge or take away fundamental rights. The majority view indicates that a constituent power was required to amend the fundamental rights.

795. The majority view has totally ignored the aspect that constituent power is located in Article 368, and therefore, amendment under that article is not a law within the meaning of Article 13(2). If Parliament is a constituted body as was said by the majoriy view in *Golak Nath's case* (supra) it would be difficult to hold that such a body could bring about a Constituent Assembly. The well-known principle that what cannot be done directly cannot be achieved indirectly will establish the basic infirmity in that majority view. If Fundamental rights can be abridged by Parliament calling a Constituent Assembly under the Residuary Entry such Constituent Assembly will be a body different from Parliament and will frame its own rules of business and Article 368 cannot have any application. That will have a strange and startling result.

796. In the scheme of the Constitution containing Article 368 a Constituent Assembly will be called extra Constitutional means and not one under the Constitution. A Constitution can be amended only in accordance with the process laid down in the Constitution. No other method is constitutionally possible than that indicated in the provision for amendment of the Constitution. Once the Constitution has vested the power to amend in the bodies mentioned therein that is the only body for amending the Constitution. The people who gave the Constitution have expressed how it is to be changed.

797. The distinction between constituent and legislative power is brought out by the feature in a rigid Constitution that the amendment is by a different procedure than that by which ordinary laws may be altered. The amending power is, therefore, said to be a recreation of the Constituent Assembly every time Parliament amends the Constitution in accordance with Article 368.

798. The two decisions in *McCawley* v. *The King*[18] and *The Bribery Commissioner* v. *Pedrick Ranasinge*[19] on which the majority view in *Golak Nath's case* (supra) relied to hold that amendment to the Constitution is an ordinary legislative process do not support that conclusion. The difference between flexible or uncontrolled and rigid or controlled Constitutions in regard to amendment is that there may be special methods of amendment in rigid or controlled Constitution. In a rigid Constitution amendment is not by exercise of ordinary legislative power. The power to amend is, therefore, described in a rigid Constitution as constituent power because of the nature of the power. In a flexible Constitution the procedure for amendment is the same as that of making ordinary law. A Constitution being uncontrolled the distinction between legislative and constituent powers gets obliterated because any law repugnant to the Constitution pro tanto repeals a Constitution as was held in *McCawley's case*(supra). Dicey in his *Law of the Constitution,* (10th Ed.) illustrates the view by his opinion that if the Dentists Act said anything contrary to the Bill of Rights which can be described as Constitutional document the Dentists Act would prevail. In a flexible or unwritten Constitution the word constitutional law is imprecise as it is used in respect of subject-matter of law, e. g., a law dealing with the Legislature. In a rigid or written Constitution whatever is in the Constitution would be the law of the Constitution.

799. In *McCawley's case* (supra) the validity of the appointment of McCawley as a Judge of the Supreme Court of Queensland was challenged as void on the allegation that Section 6, sub-section (6) of the Industrial Arbitration Act of 1916 was contrary to the provisions of the Constitution Act of Queensland, 1867. The Industrial Arbitration Act of 1916 by Section 6 sub-section (6) authorised the Governor to appoint any Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court of Queensland and provided that a Judge so appointed shall have the jurisdiction of both offices and shall hold office as a Judge of the Supreme Court during good behaviour. The sub-section further provided that Judge of the Court of Industrial Arbitration shall hold office for seven years. The Governor in-Council by commission reciting Section 6 sub-section (6) appointed McCawley who was a Judge and the President of the Court of Industrial Arbitration to be a Judge of the Supreme Court during good behaviour. By Sections 15 and 16 of the Constitution of 1867 the period during which Judge of the Supreme Court were to hold office was during good behaviour. The contention was that the appointment of McCawley under the Industrial Arbitration Act 1916 for a limited period of seven years was invalid since the Act was inconsistent with the Constitution Act, 1867 and further that the Act of 1916 could not repeal or modify the provisions of the Constitution Act.

---

[18] 1920 AC 691.

[19] 1965 AC 127

800. The Privy Council held that the Legislature of Queensland had power both under the Colonial Laws Validity Act, 1865 Section 5 and apart therefrom under Clauses 2 and 22 of the Order-in-Council of 1859, Section 7 of the Acts 18 & 19 Vict. C. 54 and Sections 2 and 9 of a the Constitution Act of 1867 to authorise the appointment of a Judge of the Supreme Court for a limited period. Section 7 of the Act 18 & 19 Vict. *C.* 54 intended an order in Council to make provision for the government of the Colony and for the establishment of a legislature. The Order-in-Council 1859 by Clause 2 gave full power to the Legislature of the Colony to make further provision in that behalf. The Order-in-Council of 1859 by Clause 22 gave the legislature full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in the same manner as any other laws for the good government of the colony.

801. Section 5 of the Colonial Laws Validity Act, gave the Legislature full power to alter the Constitution.

802. Section 2 of the Constitution Act of 1867 gave the Legislature power to make laws for the peace, welfare and good government of the Colony. Section 9 of the Constitution required a two-thirds majority of the legislative Council and Legislative Assembly as a condition precedent of the validity of legislation altering the Constitution of the Legislative Council. Section 6, sub-section (6) which authorised an appointment as a Judge of the Supreme Court only during the period during which the person appointed was a Judge of the Court of Industrial Arbitration was found to be valid legislation. It was found that the Constitution of Queensland was a flexible as distinct from rigid Constitution. Power to alter the Constitution by ordinary law was also said to exist both in virtue of the Colonial Laws Validity Act, 1865, Section 5 and independently of that Act in virtue of Clause 22 of the Order in-Council 1859 and Sections 2 and 9 of the Constitution Act of 1867.

803. The decision in *McCawley's case* (supra) shows that unless there is a special procedure prescribed for amending any part of the Constitution the Constitution is uncontrolled and can be amended by the manner prescribed for enacting an ordinary law and therefore a subsequent law inconsistent with the Constitution would pro tanto repeal the Constitution. The decision also established that a Constitution largely or generally uncontrolled may contain one or more provisions which prescribe a different procedure for amending the provisions of the Constitution. If this is prescibed the procedure for amendment must be strictly followed.

804. The Legislature of Queensland was found to be master of its own househeld except in so far as its powers were restricted in special cases. No such restriction was established in the case before the Privy Council. The Legislature had plenary power there. The Legislature was not required to follow any particular procedure or to comply with any specified conditions before it made any law inconsistent with any of the provisions of constitutional document.

805. The contention of the respondent in *McCawley's case* (supra) was that the Constitutions of Queensland was controlled and that it could not be altered merely by enacting legislation inconsistent with its Article but that it could be altered by an Act which in plain and unmistakable intention of the Legislature to alter and consequently gave effect to that intention by operative provisions. The Judicial Committee thought this Constitution would amount to a Constitution which was neither controlled nor uncontrolled. It was not controlled because the future generation could by a merely formal Act correct it at pleasure. It was said to be not uncontrolled because the framers prescribed to their successors a particular mode by which they are allowed to effect constitutional changes. Section 22 of the Order in Council conferred power and authority in Legislature from time to time to make laws altering or repealing all or any of the Order in Council conferred power and authority of the provisions of the Order in Council in the same manner as any other laws for the good government of the country. The Constitution Act of 1867 was contended to enact certain fundamental organic provisions of such a nature as to render the Constitution controlled. It was found impossible to point to any document or instruction giving or imposing on the Constitution of Queensland such a quality. The decision in *McCawley's case* (supra) related to uncontrolled Constitution which gave the Legislature full power to make laws except on one subject and, therefore, a law made by the Legislature under such a Constitution could pro tanto conflict with and repeal the Constitution. That is not our Constitution.

806. In *Ranasinghe case* (supra) the validity of the appointment of Bribery Tribunal was challenged. The Supreme Court of Ceylon took the view that the Bribery Tribunal was not appointed by the Judicial Service Commission in accordance with the provisions of Section 55 of the Ceylon Constitution Order in Council. It was, therefore, not lawfully appointed. It was common ground that the appointment of the Bribery Tribunal was not in accordance with Section 55 of the Ceylon Constitution Order in Council, 1946. Section 55 vested in the Judicial Service Commissioner the appointment, dismissal and disciplinary control of Judicial Officers, viz., Judges of lesser rank. The removal of Judges of the Supreme Court could be by the Governor-General on an address of the Senate and the House Representatives.

807. Section 29 of the Ceylon (Constitution) Order in Council provided in sub-sections (1), (2), (3) and (4) as follows:

> "29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall—
>
> (*a*) prohibit or restrict the free exercise of any religion;
>
> × × ×
>
> (3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void.
>
> (4) In the exercise of its powers under this section Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives

amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker, under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law."

808. The Judicial Committee found that there was a conflict between Section 55 of the Ceylon Constitution Order and Section 41 of the Bribery Amendment Act. The Privy Council found that Section 29(4) of the order was attracted but the requirements of Section 29(4) had not been complied with and, therefore, the appointment of the Bribery Tribunal was invalid. The certificate of the Speaker under the proviso to Section 29(4) of the Ceylon Constitution order was an essential part of the legislative process. There was no such certificate in the case of the legislation under which the appointment of the impugned Tribunal was made. The Judicial Committee said that a legislature has no power to ignore the conditions of law-making that are imposed by the regulating instrument. This restriction exists independently of the question whether the Legislature is sovereign as the Legislature of Ceylon or whether the Constitution is uncontrolled as happened in *McCawley's case* (supra) with regard to the Constitution of Queensland.

809. The Judicial Committee said "A Constitution can, indeed, be altered or amended by the Legislature, if the regulating instrument so provides and if the terms of those provisions are complied with; and the alteration or amendment may include the change or abolition of these provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be valid law unless made by a different type of majority or by a different legislative process".

810. It was contended that just as the Legislature of the Colony of Queensland had power by mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of that Colony as to the tenure of Judicial Office so the Legislature of Ceylon had no less a power to depart from the requirements of a section such as Section 55 of the Ceylon Constitution, notwithstanding the wording of Sections 18 and 29(4). Section 18 in effect says that a legislation can be passed by a majority of votes subject to the provisions in Section 29(4) of the Constitution. The Judicial Committee said that in *McCawley's case* (supra) the Legislature had full power to make laws by a majority except upon one subject that was not in question and the legislation was held to be valid because it was treated as pro tanto an alteration of the Constitution which was neither fundamental in the sense of being beyond change nor so constituted as to require any special process to pass a law upon the topic dealt with. The word "fundamental" in the sense of "being beyond change" refers to express limitations as to power of manner and form of change. These words do not mean as Mr. Palkhivala contended that there are fundamental features of the Constitution which cannot be amended.

811. The Legislature purported to pass a law which being in conflict with Section 55 of the Order in Council must be treated if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Such alterations could only be made by laws which complied with the special legislative procedure laid down in Section 29(4). The provisions in Section 29(4) were found not to confer on the

Ceylon Legislature the general power to legislature so as to amend the Constitution by ordinary majority resolution which the Queensland Legislature was found to have under Section 2 of the Queensland Constitution Act.

812. *Ranasinghe's case* (supra) shows that Parliament which by its own Act imposed procedural conditions upon the legislative process is no more limited or non-sovereign than a legislature which has such conditions imposed on it by the constitutional instrument. A constitutional instruments which places procedural restraints upon the forms of law-making places the Legislature under a compulsion to obey them. In *McCawlay's case* (supra) it was said that the Colonial Legislature with plenary powers could treat the Constitutional document which defined its powers as if it were a Dog Act. This proposition as a result of *Ranasinghe's case* (supra) is narrowed to the extent that were provisions for procedural special majority are laid down in the constitutional document they cannot be treated as a provision in the Dog Act might be.

813. These decisions indicate the distinction between procedural and substantive limitations on the legislative process. In *Ranasinghe's case* (supra) the issue was one of personal liberty in the sense that the respondent claimed the right not to be imprisoned except by a valid law. No question was raised about the right of religion protected by Sections 29(2) and (3) of the Ceylon Constitution. It was also not the respondent's case there that any provision was unamendable. It would be unusual for the Privy Council to say by way of an obiter dictum that a Provision was not amendable contrary to the respondent's submission. Though the Privy Council did not use the words "legislative and constituent" in distinguishing ordinary law from laws amending the Constitution, the Privy Council in referring to the Ceylon Constitution instrument showed that the familiar distinction is the basis of the judgment.

814. The Privy Council in dealing with Section 29 took note of the special heading under which Section 29 appears in the Constitution. That special heading is "legislative power and procedure". The opening words of Section 29 are that subject to the provisions of this order Parliament shall have powers to make laws. There are similar to the opening words in Article 245 of our Constitution. Section 18 of the Celyon Constitution prescribes the ordinary legislative procedure for making laws by a bare majority unless otherwise provided for by the Constitution, which is to be found in Section 29(4) of the Ceylon Constitution. Our Constitution in Article 100 makes an identical provision for ordinary legislative procedure. Section 29(2) confers rights of freedom of religion and Section 29(3) states that no laws shall be made prohibiting or restricting such freedom. Part III of our Constitution contains among other fundamental rights, right to freedom of religion. Section 29(3) expressly makes laws in contravention of Section 29(2) void to the extent of contravention. Article 13(2) of our Constitution expressly makes law which takes away or abridges fundamental rights void to the extent of the contravention. Section 29(4) of the Ceylon Constitution dealing with the amendment of the Constitution does not expressly make void a law amending the Constitution.

815. It follows from *McCawley's case* (supra) and *Ranasinghe's case* (supra) that a legislature has no power to ignore the conditions of law making imposed upon it which regulate its power to make law. The Ceylon Legislature had no general power to legislate so as to amend its general power by ordinary majority resolutions such as Queensland Legislature was found to have under

Section 2 of the Queensland Constitution. Peace, order and good government in Section 29(1) of the Ceylon Constitution is not the same as amendment contemplated in Section 29(4) of the Ceylon Constitution. In *Ranasinghe's case* (supra) the Judicial Committee referred to the social compact. The compact is this. The inhabitants of Ceylon accepted the Ceylon Constitution on the footing that the various rights conferred, liabilities imposed and duties prescribed under the law cannot be altered in the ordinary course of legislation by a bare majority. But if all these were to be changed then such a change could only be made under the strongest safeguard of the amending process which in the case of Ceylon was not less than two-third of the absolute membership. These rights are the solemn compact. These valuable rights are conferred on the people. Under ordinary law by ordinary majority they cannot be taken away.

816. The absence of an express provision in Section 29(4) of the Ceylon Constitution that an amendment of the Constitution in contravention of the terms of that sub-section shall be void need not support the conclusion that such an amendment was valid. Section 29(1) of the Ceylon Constitution is expressed to be "subject to the provisions of this Order" and any power under Section 29(4) is expressly subject to the proviso there. The Privy Council held that the opening words of Section 29 introduced into the Constitution of Ceylon the necessarily implied doctrine of ultra vires. The proposition will apply directly to the same opening words of our Article 245. The Privy Council accepted the distinction made in *McCawley's case* (supra) between controlled and uncontrolled Constitutions by emphasising the observation in *McCawley's case* (supra) with reference to Section 9 of the Queensland Constitution. The description of Section 29(2) of the Ceylon Constitution as an entrenched provision means that it can be amended but only by special procedure in Section 29(4). That is the meaning of the word "entrenched". This meaning alone is consistent with the clear language of the amending power and also with the decision. Section 29(4) does not limit the sovereignty of the Ceylon Legislature because the Legislature can always pass the amendment after getting two-thirds majority and the certificate.

817. Counsel for the respondent in *Ranasinghe's case* (supra) stated that there was no limitation except the procedure and even that limitation could be removed by amendment complying with sub-section (4). The Privy Council affirmed that position. There is nothing to prevent by appropriate amendment a deletion of Section 29(4) of the Ceylon Constitution which would then empower Parliament to achieve the power to amend by an ordinary majority. Section 29(1) is not legislative power alone but a composite power when read along with Section 29(4)in the context of the Ceylon Constitution. It includes both legislative and constituent power. Sub-sections (2) and (3) of Section 29 are not the grant of power but limitation on power. Its terms show that limitation is at any rate on the legislative power of enacting laws contrary to sub-sections (2) and (3) of Section 29. If Section 29(1) is a composite legislative and constituent power and sub-sections (2) and (3) are a restraint on legislative power the constituent power under sub-section (4) remains unaffected. The sequiter is that Section 29(4) is consistent only with the view that so far as amendment of sub-sections (2) and (3) is concerned amendment is permitted and there is no limitation on constituent power under Section 29(4). The Privy Council took the widest view of the amending power. In fact the narrower view was not argued.

818. Our Constitution in Article 13 (2) by its express declaration with reference to law and the State widely defined has no higher efficacy in rendering a law in contravention of its terms void than the opening words of

Article 245 have in rendering a law void in contravention of terms mentioned therein. Therefore, in treating Article 13(2) as having that effect in regard to constitutional amendment the majority judgment in *Golak Nath's case* (supra) was inept. In rejecting the distinction between legislative and constituent powers the leading majority view in *Golak Nath's case* (supra) was induced by the absence of the use of the labels but the same concepts were clearly indicated by the Privy Council by wholly describing the characteristic features of legislative and constituent powers.

819. If Article 368 had begun with a non obstante clause it could not have been said that amendment under Article 368 would be law within the meaning of Article 13(2). The Attorney-General rightly said that there is no non obstante clause in Article 368 because of the quality of amending power and because the amending power is a constituent power and not ordinary legislative power. This is the position of the amending clause in a written Constitution. When the power under Article 368 is exercised Parliament acts as a recreation of Constituent Assembly. Therefore, such power cannot be restricted by or widened by any other provision. As soon as an amendment is made it becomes a part of the Constitution. An amendment prevails over the Article or Articles amended. The fact that Article 368 confers constituent powers is apparent from the special conditions prescribed in the Article. Those conditions are different from ordinary law making process. Article 368 puts restraints on the ordinary law-making process and thus confers constituent power. The Constituent Assembly was fully aware that if any limitation was to be put on the amending power the limitation would have to be expressly provided for. Article 305 of the Draft Constitution provided reservation of seats for certain sections of people in the Legislature for 10 years. This reservation was not accepted by the Constituent Assembly. This shows that if the Drafting Committee or the Constituent Assembly wanted to exclude fundamental rights from the operation of Article 368 corresponding to Article 304 in the Draft Constitution they could have expressly done so.

820. In *Ghulam Sarwar* v. *Union of India*,[20] it was said there was a distinction between deprivation of fundamental rights by force of a constitutional provision itself and such deprivation by an order made by President in exercise of a power conferred on him under constitutional provision. The dissenting view in *Ghulam Sarwar's case* (supra) was that an order of the President was not a law within the meaning of Article 13(2). In *Mohd. Yakub* v. *State af Jammu & Kashmir*,[21] the majority view of the Constitution Bench was that an order of the President under Article 359 was not law within the meaning of Article 13(2). There is no distinction between Article 358 and Article 359(1). Article 358 by its own force suspends the fundamental rights guaranteed by Article 19. Article 359(1) on the other hand does not suspend any fundamental rights of its own force but it gives force to order by the President declaring suspension of the enforcement of any fundamental right during the period of emergency. In *Mohd. Yakub's case* (supra) it was said that it could not mean that an order under Article 359(1) suspending the enforcement of a particular fundamental right had still to be tested under the vary fundamental right which it suspended. *Mohd. Yakub's case* (supra) establishes that the expression "law" in Article 13(2) is not all embracing in spite of the exclusive definition of law in Article 13(3)(*a*).

---

[20] (1967) 2 SCR 271 : AIR 1967 SC 1335 : (1969) 2 SCJ 531 : 1967 Cri LJ 1204.

[21] (1968) 2 SCR 227 : AIR 1968 SC 765 : (1968) 1 SCJ 914. : 1968 Cri LJ 972 : 1968 Lab IC 872.

821. The word "law" appears in various Articles of our Constitution but not in Article 368. The reason is that the power under Article 368 is not a power to make ordinary laws under the Constitution but is the constituent power. There could be no law within the the meaning of Article 13(2) at any stage before the amendment became a part of the Constitution under Article 368. There is no hiatus between an amendment being a law and thereafter a part of the Constitution. Immediately upon the passage of the Bill for the amendment the Constitution stands amended.

822. The historical background of Article 13(2) throws some light on the question as to whether Article 13(2) prevails over Article 368. On March 17, 1947 the Constitutional Advisor Sir B. N. Rau, had addressed a letter to the members of Central and Provincial Legislatures. A questionnaire was annexed to that letter. Question No. 27 was "what provisions should be made regarding amendments to the Constitution". A note was appended to that question which will be found in Shiva Rao: *Framing of India's Constitution* referred to as Shiva Rao Vol. II, pp 448-451. The methods of amendment of Constitution in the United Kingdom, Canada, Australia, United States of America, Switzerland and Ireland were elucidated in that note. The note also drew attention that the fact that in various Constitution express limitations were put on amending certain provisions of the Constitution. The portion of the note relating to the Constitution of Australia indicated such limitations.

823. The draft report of the sub-committee on fundamental rights, dated April 3, 1947 contained an annexure which dealt with fundamental rights. See Shiva Rao, Vol. II, p. 137 seq. Clause 2 of the annexure was as follows:

> "Any law or usage in force within the territories of the Union immediately before the commencement of this Constitution and any law which may hereafter be made by the State inconsistent with the provisions of this Chapter/Constitution shall be void to the extent of such inconsistency."

824. The Constitutional Advisor suggested that the word "Constitution" was preferable to the word "chapter" because the entire Constitution was to prevail over law.

825. On April 23, 1947 the Advisory Committee on Fundamental Rights present an interim report addressed to the President of the Constituent Assembly containing an annexure providing for justiciable fundamental rights. See Shiva Rao, Vol. II, pp. 294-296 seq. Clause 2 of the Annexure to that report was as follows:

> "All existing laws, notification, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency nor shall the Union or any unit make any law taking away or abridging any such right."

826. Clause 2 of the annexure to the interim report was discussed in the Constituent Assembly on April 29, 1947. Shri K. Santhanam moved an amendment to Clause 2. The amendment was as follows. In Clause 2 for the words "nor shall the Union or any unit make any law taking away or abridging any such right" the following be substituted: "Nor shall any such right be taken away or abridged except by an amendment of the Constitution". The amendment was accepted as will appear in *Constituent Assembly Debates*, Vol. III, p. 416.

827. In October, 1947 the Draft Constitution was prepared by the Constitutional Advisor. Clause 9(2) of the said Draft Constitution which later on corresponded to Article 13(2) of our Constitution was as follows:

> "Nothing in this Constitution shall be taken to empower the State to make any law which curtails or taking away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under Section 232 and any law made in contravention of this sub-section shall, to the extent of the contravention, be void."

828. It will be seen that Clause 9(2) in the Draft Constitution included the qualification "except by way of amendment of the Constitution under Section 232". Clause 232 in the Draft Constitution prepared by the Constitutional Advisor became Article 304 in the Constitution prepared by the Drafting Committee and eventually became Article 368 of our Constitution. In Shiva Rao, Vol. III, p. 325 it appears that the Drafting Committee on October 30, 1947 at a meeting gave a note forming the minutes of that meeting that Clause 9(2) should be revised as follows:—

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this sub-section shall, to the extent of the contravention, be void."

829. No reason is recorded in these minutes as to why the resolution adopted by the Constituent Assembly by passing Shri Santhanam's amendment was disregarded. No indication was given in the forwarding letter of Dr. Ambedkar in the Note appended thereto as to why the amendment of Shri Santhanam which had been accepted by the Constituent Assembly was deleted. Nor does the Draft Constitution indicate either by sidelines or in any other manner that the decision of the Constituent Assembly had been disregarded.

830. This history of the formation and framing of Article 13(2) shows that the intention of the Constituent Assembly was that Article 13(2) does not control the Article relating to the amending of the Constitution. It must be assumed that the Drafting Committee consisting of eminent men considered that an express exclusion of the amending Article from the operation of the clause corresponding to Article 13(2) was unnecessary and the fear that that Article would cover the amending Article was groundless. It also appears that no discussion took place after the Draft Constitution had been presented to the Constituent Assembly by Dr. Ambedkar on the deletion or disregard of Shri Santhanam's amendment. The history of Article 13(2) shows that the Constituent Assembly clearly found that it did not apply to an amendment of the Constitution.

831. The distinction between constituent and legislative power in a written Constitution is of enormous magnitude. No provision of the Constitution can be declared void because the Constitution is the touchstone of validity. There is no touchstone of validity outside the Constitution. Every provision in a controlled Constitution is essential or so thought by the framers because of the protection of being amendable only accordance with the Constitution. Every Article has that protection. The historical background of Article 13(2) indicates that the Constitution-makers dealt separately with legislative power by providing for the same in Part XI and entrusted the constituent power to authorities mentioned in Article 368 and that authority has the same power as the Constituent Assembly because it has not put any fetter upon it. The draft Article 305 which provided for a limitation as to time for amendment of certain matters was eventually deleted. If the framers of the Constitution wanted to forbid something they would say so.

832. The vitality of the constituent power not only indicates that the Constitution is in the words of Maitland the *Supreme Potestas* but also the fact that the amending power is put in a separate Article and Part of the Constitution establishing that it deals with a topic other than legislative power and the power is meant to be exhaustive leaving nothing uncovered. The very fact that amending power is not put in any legislative power or is not attached to a subject which is the subject-matter of legislative power leaving aside the four sets of provisions, namely, Articles 4, 169, Paragraph 7, Schedule 5 and Paragraph 21, Schedule 6 containing specific power of amendment shows that that amending power was meant to be exhaustive and plenary. If a power of amendment without any express limitation was given it was because a legal constitutional way of bringing a change in the Constitution was desirable or necessary. Otherwise there would be no legal way of effecting the change. It cannot be attributed to the framers of the Constitution that they intended that the Constitution or any part of it could be changed by unconstitutional or illegal methods.

833. If an amendment of the Constitution is made subject to Article 13 (2) the necessary conclusion then is that no amendment of the Constitution is possible. The opening words of Article 245 which deals with legislative power indicate that any law made under Article 246(1), read with List I of the Seventh Schedule is subject to the limitations on legislative power imposed by all the Articles in the Constitution. These limitations cannot be altered or amended in exercise of legislative power, if the power of amendment is said to be located in the Residuary Entry 97 in List I. The history of residuary power in the Government of India Act, 1935 whose scheme was adopted in the Constitution shows that the topic of amendment was not only present to the mind of the Constituent Assembly but also that the Constituent power could not reside in the residuary power.

834. The conclusions on the question as to whether Article 13(2) overrides Article 368 are these. Article 13(2) relates to laws under the Constitution. Laws under the Constitution are governed by Article 13(2). Article 368 relates to power and procedure of amendment of the Constitution. Upon amendment of the Constitution the Constitution shall stand amended. The Constitution is self-validating and self-executing. Article 13(2) does not override Article 368. Article 13(2) is not a fundamental right. The Constitution is the touchstone. The Constituent power is sui generis. The majority view in *Golak Nath's case* (supra) that Article 13(2) prevails over Article 368 was on the basis that there was no distinction between constituent and legislative power and an amendment of the Constitution was law and that such law attracted the opening words of Article 245 which in its turn attracted the provisions of Article 13(2). Parliament took notice of the two conflicting views which had been taken of the unamended Article 368, took notice of the fact that the preponderating judicial opinion, namely, the decisions in *Shankari Prasad's case* (supra) *Sajjan Singh case* (supra) and the minority views of five learned Judges in *Golak Nath case* (supra) were in favour of the view that Article 368 contained the power of amendment and that power was the constituent power belonging to Parliament. Wanchoo, J., rightly said in *Golak Nath's case* (supra) that the power under Article 368 is a constituent power to change the fundamental law, that is to say, the Constitution and is distinct from ordinary legislative power. So long as this distinction is kept in mind Parliament will have power under Article 368 to amend the Constitution and what Parliament does under Article 368 is not ordinary law-making which is subject to Article 13(2) or any other Article of the Constitution. This view of Wanchoo, J., was adopted by Parliament in the Constitution 24th Amendment Act which made explicit that under Article 368 Parliament has the constituent power to amend this Constitution.

835. In order to appreciate and assess Mr. Palkhivala's other contention of implied and inherent limitations on the amending power, it is necessary to find out the necessity and importance of the amending power to arrive at the true meaning of the expression "amendment".

836. Mr. Palkhivala made these submissions. The word "amendment" means on the one hand not the power to alter or destroy the essential features and on the other there are inherent and implied limitations on the power of amendment. It is imperative to consider the consequences of the plea of limited power and also of the plea of limitless power. The test of the true width of a power is not how probable it is that it may be exercised, but what can possibly be done under it. The hope and expectation that it will never be used is not relevant. Reliance is placed on the observations in Maxwell on the *Interpretation of Statutes*, 12th Ed. (1969), pp. 105-106 that it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words, before adopting any proposed construction of a passage susceptible of more than one meaning. The reasonableness of the consequences which follow from a particular construction on the one hand and the unreasonable result on the other are the two alternatives in the quest for the true intention of Parliament. Crawford *Construction of Statutes*, (1940 Ed.), pp. 286-290 was referred to for the proposition that where the statute is ambiguous or susceptible to more than one meaning, the construction which tends to make the statute unreasonable should be avoided. Uncertainty, friction or confusion on a construction is to be avoided because preference is to be given to the smooth working of the statute. The Court adopts which is just reasonable and sensible rather than that which is none of these things. It is not to be presumed that the Legislature intended the legislation to produce inequitable results. Usurpation of power contrary to the Constitution is to be avoided.

837. Reliance was placed by Mr. Palkhivala on *American Jurisprudence*, 2d, Vol. 16, Article 59 at pp. 231-232, Article 72 at p. 251, Article 287 at pp. 270-71 and Article 88 at pp. 273-74 in support of these propositions. First, questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments particularly statutes. External aids or arbitrary rules applied to the construction of a Constitution are of uncertain value and should be used with hesitation and circumspection. Second, Constitutions are general and many of the essentials with which Constitutions treat are impliedly controlled or dealt with by them and implication plays a very important part in constitutional construction. What is implied is as much a part of the instrument as what is expressed. Third, a Court may look to the history of the times and examine the state of things existing when the Constitution was framed and adopted. The Court should look to the nature and object of the particular powers, duties and rights in question with all the light and aids of the contemporary history. Fourth, proceedings of conventions and debates are of limited value as explaining doubtful phrases. Similarly, the opinions of the individual members are seldom considered as of material value.

838. Mr. Palkhivala said that the word "amend" may have three meanings. First, it may mean to improve or better to remove an error, the quality of improvement being considered from the stand point of the basic philosophy underlying the Constitution. Second, it may mean to make changes which may not fall within the first meaning but which do not alter or destroy any of the basic essential or any of the essential features of the Constitution. Third, it may mean to make any changes in the Constitution including changes falling outside the second meaning. The first meaning was preferred. The second was said to be a possible construction. The third was ruled out.

839. The crux of the matter is the meaning of the word "amendment" The Oxford Dictionary meaning of the word is to make professed improvements in a measure before Parliament; formally, to alter in detail, though practically it may be to alter its principle, so as to thwart it. The Oxford Dictionary meanings are also alteration of a bill before Parliament; a clause, paragraph, or words proposed to be substituted for others, or to be inserted in a bill (the result of the adoption of which may even be to defeat the measure). In *Words and Phrases Permanent Edition*, Volume 3 the meanings of the word "amend" and "amendment" are change or alteration. Amendment involves an alteration or change, as by addition, taking away or modification. A broad definition of the word "amendment" will include any alteration or change. The word "amendment" when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular article or clause.

840. The contention that the word 'amendment" in Article 368 should bear a limited meaning in view of the expression "amend by way of addition, variation or repeal any of the provisions of this Schedule" occurring in Paragraphs 7 and 21 in Schedules 5 and 6, is unsound for the following reasons.

841. First, the power of amendment conferred by the four provisions, namely, Article 4, read with Articles 2 and 3, Article 169, Paragraphs 7 and 21 in Schedules 5 and 6 is a limited power. It is limited to specific subjects. The exercise of the power of amendment under those four provisions, if treated by Articles themselves, is an uncontrolled power since the power can be exercised by an ordinary law. But as a part of the Constitution the power is a subordinate power because these Articles themselves are subject to the amending provisions of Article 368. Article 368 is the only provision of the Constitution which provides for the amendment of this Constitution which means the Constitution of India and every part thereto. It may be mentioned that in construing Article 368 the title of the part "Amendment of the Constitution" is an important aid to construction. The marginal note which speaks of the procedure of amendment is not complete by itself because the procedure when followed results in the product, namely, an amendment of the Constitution which is not only a matter of procedure.

842. Second, these four provisions which are in the same terms, namely, "no such law shall be deemed to be an amendment of this Constitution for the purpose of Article 368" show that but for these terms the amendment would have fallen within Article 368 and was being taken out of it. This is an important consideration particularly in connection with Schedules 5 and 6 which provide that Parliament may, from time to time by law, amend by way of addition, variation or repeal any of the provisions of this Schedule. These provisions show that an amendment by way of addition, variation or repeal will also fall within the amendment of the Constitution provided for in Article 368 but is being taken out of Article 368. This express exclusion contains intrinsic evidence that the meaning of the word "amendment" in Article 368 includes amendment by way of addition, alteration or repeal.

843. Third, Paragraphs 7 and 21 in Schedules 5 and 6 which provide that Parliament may from time to time by law, amend by way of addition, variation or repeal indicate the necessity of amendments from time to time. The expression "by way of" does not enlarge the meaning of the word "amendment" but clarifies. The expression "by way of" shows that the words addition, variation or repeal are substitutes of the word "amendment" and are forms of intention. The whole Schedule cannot be repealed either by Paragraph 7 or by Paragraph 21, because Article 244 provides for the administration of Scheduled Areas and tribal areas on the application of the two respective Schedules. The words "from time to time" also indicate that because of subject-matter amendments may be from time to time. The history behind the two Schedules originates in Sections 91 and 92 of the Government of India Act, 1935 dealing with excluded areas and partially excluded areas.

844. Fourth, reference was made to Section 9(1)(*c*) of the India Independence Act, 1947 which empowered the Governor-General to make omissions from, additions to and adaptations and modification to the Government of India Act, 1935. The Government of India (Third Amendment) Act, 1949 amended Section 291 of the 1935 Act and empowered the Governor-General the make such amendments as he considers necessary whether by way of addition, modification or repeal. It was, therefore, said that when our Constitution did not use the expression "by way of addition, modification or repeal" the word " amendment" in Article 368 will have a narrower meaning. The expression "amendment" has been used in several Articles of the Constitution. These are Articles 4(1) and (2), 108(4), 109(3) and 4, 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1)and (2), 240(2), 274(1), 304(*b*) and 349. In every case amendment is to be by way of variation, addition, or repeal. Again, different expression have been used in other Articles. In Article 35(*b*) the words are alter or repeal. In Article 243(1) the words are repeal or amend. In Article 252(2), the expression is amend or repeal. In Article 254(2) proviso the words are add to, amending, variation or repeal. In Article 320(5) the words are such modification whether by way of repeal or amendment, In Article 372(1) the words are altered or repealed or amended. In Article 372(2) the words are such adaptation and modifications by way of repeal or amendment. In Article 392(1) the expression is such adaptations by way of modification, addition or commission. Again, in Article 241(2) the words are modification or exceptions. In Article 364 the words used are exceptions or modifications. In Article 370(1)(*d*) and (3) the words are modifications and exceptions. Again in Schedule 5, Paragraph 5(1) and Schedule 6, Paragraphs 12(*a*), (*b*), 19(1)(*a*) the words used are exceptions or modifications. Modifications in Article 370(1)(*d*) must be given the widest meaning in the context of a Constitution and in that sense it includes an amendment and it cannot be limited to such modifications as do not make any radical transformation.

845. The several Constitution Amendment Act show that amendments to the Constitution are made by way of addition, substitution, repeal. The

Attorney-General is right in his submission that the expression "amendment of this Constitution" has a clear substantive meaning in the context of a written Constitution and it means that any part of the Constitution can be amended by changing the same either by variation, addition or repeal.

846. The words "Amendment of this Constitution may be initiated" and the words "Constitution shall stand amended in accordance with the terms of the Bill" in Article 368 indicate that the word "amendment" is used in an unambiguous and clear manner. The Attorney-General said that our Constitution is not the first nor is the last one to use the word "amendment". The American Constitution in 1787 used the word "amend". Several Constitutions of other countries have used the word "amend". The word "amend" is used in a Constitution to mean any kind of change. In some Constitutions the words alteration or revision have been used in place of the words amend or along with the word amendment. Some times alteration and revision of the Constitution are also spoken of as amendment of the Constitution.

847. Constitutional provisions are presumed to have been carefully and deliberately framed. The words alterations or amendments, the words amendments or revisions, the words revision and alteration are used together to indicate that those words have the same meaning in relation to amendment and change in Constitution.

848. The meaning and scope of amending power is in the object and necessity for amendment in a written Constitution.

849. The various amendments which have already been carried out to our Constitution indicate that provisions have been added, or varied or substituted. The Attorney-General gave to correct reasons for the object and necessity of the power of amendment in a written Constitution. First, the object and necessity of amendment in a written Constitution means that the necessity is for changing the Constitution in an orderly manner, for otherwise the Constitution can be changed only by an extra constitutional method or by revolution. Second, the very object of amendment is to make changes in the fundamental law or organic law to make fundamental changes in the Constitution, to change the fundamental or the basic principles in the Constitution. Otherwise there will be no necessity to give that importance to the high amending power to avoid revolution.

850. The object of amendment is to see that the Constitution is preserved. Rebellion or revolution is an illegal channel of giving expression to change. The "consent of the governed" is that each generation has a right to establish its own law. Condition change. Men change. Opportunities for corresponding change in political institutions and principles of Government therefore arise. An unamendable Constitution was the French Constitution which by an amendment to the Constitution adopted in 1884 declared that the National Assembly shall never entertain a proposal for abolition of the republican form of Government. The United States Constitution provided that no amendment could be made prior to 1808 affecting the First and Fourth Clauses of Section 9 of Article 1, relative (*sic*) to the prohibition of the importation of slaves, and that no State without its consent shall be deprived of equal suffrage in the Senate. These are examples of limiting the sovereign power of the people to change the Constitution.

851. An unamendable Constitution is said to be the worst tyranny of time. Jefferson said in 1789 that each generation has a right to determine a law under which it lives. The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The machinery of amendment is like a safety valve. It should not be used with too great facility nor should be too difficult. That will explode and erode the Constitution.

852. Most Constitutions are rigid in the sense that they are amendable only by a different process than that by which ordinary laws may be altered. Thus they distinguish clearly between the constituent power and the legistative power, each being exerciseable by different organs according to different processes. Chief Justice Marshall said that the opponents of change want changes just as much as anyone else. They want however to determine what the changes shall be.

853. Amendment is a form of growth of the Constitution inasmuch as amendment means fundamental changes. The Constitution devises special organs or special methods to amend or change the fundamental principles that create the Government. The methods of amendment may be by ordinary law-making body as in Great Britain or by the ordinary law-making body with special procedure or unusual majority or by special organs of government created for the purpose such as constitutional convention or by the electorate in the form of referendum or of initiating a referendum. In case a written Constitution makes no provision for amendment it is usually held that the national law-making body by ordinary procedure may amend the Constitution. If a Constitution provides the method of amendment that method alone is legal. Any other method of amendment would be a revolution. The deliberative and restrictive processes and procedure ensure a change in the Constitution in an orderly fashion in order to give the expression to social necessity and to give permanence to the Constitution.

854. The people expressed in the Preamble to our Constitution gave the Constitution including the power to amend the Constitution to the bodies mentioned in Article 368. These bodies represent the people. The method to amend any part of the Constitution as provided for in Article 368 must be followed. Any other method as for example convening Constituent Assembly or Referendum will be extra constitutitional or revolutionary. In our Constitution Article 368 restricts only the procedure or the manner and form required for amendment but not the kind or the character of the amendment that may be made There are no implied limitations to the amending power. The Attorney-General summed up pithily that the Constitution acts not only for the people but on the people.

855. The Attorney-General relied on several American decisions in support of these propositions. First, the word "amendment" does not mean improvement. The view in *Livermore* v. *Waite*[22] of a single learned Judge that amendment means improvement was not accepted in *Edwards* v. *Lesseur*[23]. Second, ratification by people of States would be void when a federal amendment proposed by Congress is required to be ratified by the Legislatures of the States. *Ex-parte Dillon*[24]. The Legislature is a mere agency for ratification of a proposed amendment. *Ex-parte Dillon's case* (supra) did not accept the view of the learned single Judge in *Livermore* v. *Waite* (supra) that amendment means only improvement. Third, the argument that word "amendment" carries its own limitations regarding fundamental principles or power of State or control of the conduct of the individuals by devising a method of referendum by State Legislatures is adding a new method of amendment. This not permissible. ***Feigenspan*** v. ***Bodine***[25]. The only method of amendment is that prescribed by the Constitution. The theory of referendum by State Legislatures is not valid. Fourth, the assumption that ratification by State Legislatures will voice the will of the people is against the prescribed method of amendment and grant of authority by the people to Congress in the manner laid down in Article V of the American Constitution. It is not the function of Courts or legislative bodies to alter the method which the Constitution has fixed. Ratification is not an act of legislation. It derives its authority from the Constitution. ***Hawke*** v. ***Smith,***[26] ***Dillon*** v. ***Gloss,***[27] ***Leser*** v. ***Garnett.***[28] Fifth, the power of amendment extends to every part of the Constitution. In amending the Constitution the General Assembly acts in the character and capacity of a convention expressing the supreme will of the sovereign people and is unlimited in its power save by the Constituion. ***Ex-parte Mrs. D. C. Kerby***[28a]. Sixth, the argument that amendments which touch rights of the people must be by convention is rejected by Supreme Court in American Article V of the American Constitution is clear in statement and meaning and contains no ambiguity. Where the intention is clear there is no room for construction. ***Rhode Island*** v. ***Palmer,***[28b] ***U. S.*** v. ***Sprague***[29] Seventh, principles of the Constitution can be changed under Article V, ***Schneiderman*** v. ***United State of America***[30]. Eight, the Constitution provides the method of alteration. While the procedure for amending the Constitution is restricted there is no restraint on the kind of amendment that may be made, ***Whitehall*** v. ***Elking.***[31]

---

[22] 102 Cal 118.
[23] 33 SWR 1130.
[24] 262 Fed Rep 563.

856. Except for special methods of amendment in a rigid or controlled Constitution although the methods may vary in different Constitutions and except for express limitations, if any, in rigid or controlled Constitutions, the meaning and scope of the amending power is the same in both the flexible and rigid forms.

857. The flexible Constitution is one under which every law of every description can be legally changed with the same ease and in the same manner by one and the same body Laws in a flexible Constitution are called constitutional because they refer to subjects supposed to affect the fundamental institutions of the State, and not because they are legally more sacred or difficult to change than other laws.

858. A rigid Constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The rigidity of the Constitution consists in the absence of any right of the Legislatures when acting in its ordinary capacity to modify or repeal definite laws termed constitutional or fundamental In a rigid Constitution the term "Constitution" means a particular enactment belonging to the Articles of the Constitution which cannot be legally changed with the same ease and in the same manner as ordinary laws.

859. The special machinery for constitutional amendment is the limitation of the power of the Legislature by greater law than by the law of the ordinary legislation. The Constituent Assembly knowing that it will disperse and leave the actual business of legislation to another body, attempts to bring into the Constitution that it promulgates as many guides to future action as possible. It attempts to arrange for the "recreation of a constituent assembly" whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions. There may be some elements of the Constitution which the constituent assembly wants to remain unalterable. These elements are to be distinguished from the rest. The Fifth Clause in the United States Constitution is that no State without its own consent shall be deprived of its equal suffrage in the Senate. The Attorney-General rightly said that just as there are no implied limitations in flexible Constitutions similarly there are no implied limitations in a rigid Constitution. The difference is only in the method of amendment. Amendment can be be made by ordinary legislature under certain restrictions, or by people through a referendum or by majority of all the units of a federal State or by a special convention.

---

[25] 264 Fed Rep 186.
[26] 253 US 221.
[27] 256 US 368.
[28] 258 US 130.
[28a] 36 Am LR 1415 (*Annotated*).
[28b] 253 US 350.
[29] 282 US 716.
[30] 320 US 118.
[31] 289 US 54.

860. In a rigid Constitution the Legislature by reason of their well matured long and deliberately formed opinion represent the will of the undoubted majority. But even such will can be thwarted in the amendment of the organic law by the will of the minority. In case where the requisite majority is not obtained by the minority thwarting an amendment, there is just as much danger to the State from revolution and violence as there is from what is said to be the caprice of the majority. The safeguards against radical changes thus represent a better way and a natural way of securing deliberation, maturity and clear consciousness of purpose without antagonising the actual source of power in the democratic state.

861. The term "amendment" connotes a definite and formal process of constitutional change. The force of tradition and custom and the judicial interpretation may all affect the organic structure of the State. These processes of change are the evolution of Constitution.

862. The background in which Article 368 was enacted by the Constituent Assembly has an important aspect on the meaning and scope of the power of amendment.

863. On November 12, 1946 Sir B. N. Rau, Constitutional Adviser prepared a brochure containing Constitution of the British Commonwealth Countries and the Constitutions of other countries. Different countries having different modes of amendment were referred to. In the same volume the fundamental rights under 13 heads were extracted from 13 selected countries like U.S.A., Switzerland, Germany, Russia, Ireland, Canada, Australia. Two features follow from that list. First, there is no absolute standard as to what constitutes fundamental right. There is no such thing as agreed fundamental rights of the world. Second, fundamental rights which are accepted in our Constitution are not superior to fundamental rights in other Constitutions nor can it be said that the fundamental rights are superior to Directive Principles in our Constitution.

864. On March 17, 1947 a questionnaire was circulated under the subject as to what provisions should be made regarding the amendment of the Constitution. The draft clause of amendment to the Constitution prepared by the Constitutional Adviser at that time indicates that an amendment may be initiated in eithar House of the Union Parliament and when the proposed amendment is passed in each House by a majority of not less than two-thirds of the total number of members of that House and is ratified by the Legislatures of not less that two-thirds of the units of the

Union, excluding Chief Commissioners' Provinces, it shall be presented to the President for his assent; and upon such assent being given the amendment shall come into operation. There were two explanations to that clause.

865. On April 29, 1947 Shri Santhanam's amendment to the draft clause was accepted. The amendment was "that this clause also if necessary may be amended in the same way as any other clause in the Constitution". In June, 1947 the drafting of the amending clause started. Originally it was numbered 232. Eventually, Articles 304 and 305 came into existence in place of draft Article 232. The first draft of the amendment clause was given by Sir B. N. Rau in March, 1947. By June, 1947 and thereafter he recommended the procedure favoured by Sir Alladi Krishnaswami Ayyar and Sir Gopalswami Ayyangar, namely, passage by two-thirds majority in Parliament and ratification by like majority of Provincial Legislatures. On February 21, 1948 the draft Constitution was ready. Draft Articles 304 and 305 related to amendment. Article 305 provided for reservation of seats for minorities for ten years unless continued in operation by an amendment of the Constitution.

866. The following features emerge. First, the Constituent Assembly made no distinction between essential and non-essential features. Secondly, no one in the Constituent Assembly said that fundamental rights could not be amended. The framers of the Constitution did not have any debate on that. Thirdly, even in the First Constitution Amendment debate no one doubted change of amendment of fundamental rights. At no stage it appeared that fundamental rights are absolute. While a Constitution should be made sound and basic it should be flexible and for a period it should be possible to make necessary changes with relative facility.

867. Certain amendments to Article 304 were proposed. One proposed amendment No. 118 was that amendment was to be passed in two Houses by a clear majority of the total membership of each House. Another proposed amendment No. 210 was that for a period of three years from the commencement of the Constitution, any amendment certified by the President to be not one of substance might be made by a simple majority. This also stated that it would include any formal amendment recommended by a majority of the Judges of the Supreme Court on the ground of removing difficulties in the administration of the Constitution or for the purpose of carrying out the Constitution in public interest. The third proposed amendment No. 212 was that no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, shall be permissible and any amendment which is or is likely to have such an effect shall be void and ultra vires of any legislature. It is noteworthy that this amendment was withdrawn. (See *Constituent Assembly Debates*, Vol. IX, p. 1665.)

868. In the first category the framers devised amendment by Parliament by a simple majority. These are Articles 2 and 4 which deal with States. As far as creation or re-constitution of States is concerned, it is left to Parliament to achieve that by a simple majority. Again, draft Article 148-A which eventually became Article 169 dealing with upper Chambers in the States gave Parliament power to abolish the Upper Chambers or to create new Second Chambers. Schedules 5 and 6 were left to be amended by Parliament by simple majority. The second category of amendment requires two-thirds majority. It is in that connection that the statement of Dr. Ambedkar "If the future Parliament wishes to amend any particular Article which is not mentioned in Part III or Article 304 all that is necessary for them is to have the two-thirds majority then they can amend it" was invoked by Mr. Palkhivala to support his submission that Part III was unamendable. That is totally misreading the speech. The speech shows that some Articles would be amendable by bare majority, others would require two-thirds majority and the third category would require two-thirds majority plus ratification by the States.

869. Proceedings in the Constituent Assembly show that the whole Constitution was taken in broad prospective and the amendments fell under three categories providing for simple majority, or two-thirds majority or two-thirds majority and ratification by the States. These different procedures were laid down to avoid rigidity.

870. The Constitution First Amendment Act which added Article 15(4), substituted words in Articles 19(2) and Article 19(6), inserted Article 31-A indicates interesting features. The two criticisms at that time were as to what was the hurry and secondly that the Government was trying to take more power to itself. The answers are that a Constitution which is responsive to the people's will and their ideas and which can be varied here and there, will command respect and people will not fight against change. Otherwise, if people feel that it is unchangeable and cannot be touched, the only thing to be done by those who wish to change it is to try to break it. That is a dangerous thing and a bad thing.

871. In this background there is no doubt about the meaning and scope of Article 368. The Attorney-General rightly said that if there be any doubt contemporaneous practical exposition of the Constitution is too strong and obstinate to be shaken or controlled. In *Mopherson* v. *Blacker*,[32] it is said that where plain and clear words occur there is no difficulty but where there is doubt and ambiguity contemporaneous and practical exposition is a great weight. In *The Automobile Transport (Rajasthan) Ltd.* v. *The State of Rajasthan & Others.*,[33] this Court took notice of the feature that Constitution-makers had deep knowledge of Constitutions and constitutional problems of other countries.

872. Mr. Seervai relying on *British Coal Corporation* v. *King*,[34] submitted that in interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of powers must be adopted. A strict construction applicable to penal or taxing statute will be subversive of the real intention of Parliament if applied to an Act passed to ensure peace, order and good government. Largest meaning is given to the allocated specific power. If there are no limitations on the power it is the whole power. Grant of power of amendment cannot be cut down except by express or implied limitations. The conclusion is that the meaning of the word "amendment" is wide and not restricted

873. The contention of Mr. Palkhivala on behalf of the petitioner is that under Article 368 as it stood prior to the amendment there were implied and inherent limitations on the power of amendment. It was said that the word "amendment" would preclude the power to alter or destroy the essential features and the basic elements and the fundamental principles of the Constitution. This contention was amplified as follows. The Constitution is given by the people unto themselves. The power to decide upon amendment is given to the 5 year Parliament which is a creature of the Constitution.

---

[32] 146 US 1 : 36 L Ed 869.

[33] (1963) 1 SCR 491 : AIR 1962 SC 1406.

[34] 1935 AC 500.

Article 368 does not start with the non obstante clause. Article 368 uses the word "amendment" simplicter. Less significant amendment powers in other parts of the Constitution use the words "add, alter, repeal or vary" in addition to the word "amendment", as will appear in Articles 31-B, 35(*b*), 252(2), 372, 372-A(2), Paragraph 7, Schedule 5, Paragraph 21, Schedule 6. Article 368 talks of an amendment of this Constitution and does not extend the amending power to "all or any of the provisions of this Constitution". On a wide construction of the word "amendment" all fundamental rights can be taken away by the requisite majority whereas much less significant matters require the concurrence of at least half the States under the proviso to that Article.

874. The basic human freedoms are all of the most fundamental importance to all the States and all the citizens. Article 32 is no less important to the citizens of States than Article 226. The Preamble is not a part or provision of the Constitution. Therefore, the Preamble cannot be amended under Article 368. The nature and the contents of the Preamble are such that it is incapable of being amended. If the Preamble is unalterable it necessarily follows that those features of the Constitution which are necessary to give effect to the Preamble are unalterable. Fundamental rights are intended to give effect to the Preamble. They cannot, therefore, be abridged or taken away. The provisions of Article 368 themselves can be amended under that very Article. If the word "amendment" is read in the widest sense Parliament will have the power to get rid of the requisite majority required by Article 368 and make any constitutional amendments possible by bare majority. Parliament can provide that hereafter the Constitution shall be unamendable. Parliament can reduce India to a status which is neither sovereign nor democratic nor republic and where the basic human rights are conspicuous by their absence.

875. Mr. Palkhivala submits that the principle of inherent or implied limitations on power to amend the controlled Constitution stems from three basic features. First, the ultimate legal sovereignty resides in the people. Second, Parliament is only a creature of the Constitution Third, power to amend the Constitution or destroy the essential features of the Constitution is an application of ultimate legal sovereignty.

876. Mr. Palkhivala enumerated 12 essential features. These were as follows: (1) The supremacy of the Constitution. (2) The sovereignty of India. (3) The integrity of the country. (4) The democractic way of life. (5) The republican form of Government. (6) The guarantee of basic human rights elaborated in Part III of the Constitution. (7) A secular State. (8) A free and independent judiciary (9) The dual structure of the Union and the States. (10) The balance between the Legislature, the executive and the judiciary. (11) A Parliamentary form of Government as distinct from the presidential form of Government. (12) Article 368 can be amended but cannot be amended to empower Parliament to alter or destroy any of the essential features of the Constitution, make the Constitution literally or practically unamendable, make it generally amendable by a bare majority in Parliament, confer the power of amendment either expressly or in effect on the State Legislatures and delete the proviso and deprive the States of the power of ratification which is today available to them in certain broad areas.

877. The Constitution 24th Amendment Act was impeached by Mr. Palkhivala on three grounds. First, by substituting the words "amend by way of addition, variation or repeal" in place of the word "amendment" in Article 368 the power was widened. Second, the 24th Amendment made explicit that when Parliament makes a constitutional amendment under Article 368 it acts in exercise of constituent power. Third, it had provided by amendment in Articles 13 and 368 that the power in Article 13(2) against abridging or taking away of the fundamental rights shall not apply to any amendment under Article 368. The Constitution 24th Amendment Act is, therefore, to be construed as empowering Parliament to exercise full constituent power of the people and to vest in Parliament the ultimate legal sovereignty of the people as authorising Parliament to alter or destroy all or any of the essential features, basic elements and fundamental principles of Constitution. Likewise, Parliament is construed by the Constitution 24th Amendment Act to be authorised to damage or destroy the essence of all or any of the fundamental rights. Therefore, the amendment must be illegal and invalid.

878. In the alternative it was submitted on behalf of the petitioner that if the Constitution 24th Amendment is valid it can be only on a reading down of the amended provisions of Articles 13 and 368 which reading would preserve the original inherent and implied limitations. Even after the Constitution 24th Amendment Act Parliament will have no power to alter or destroy the essential features of the Constitution and secondly, fundamental rights are among the essential features of the Constitution and, therefore, the essence of any of the fundamental rights cannot be altered or destroyed or damaged even when they are sought to be abridged.

879. The Attorney-General stressed the background in which Article 368 was enacted by the Constituent Assembly to show that any limitation on the amending power was never in controversy. The only controversy was regarding the degree of flexibility of an amendment of all the provisions of the Constitution. Our Constitution has adopted three methods of amendment of the Constitution. Certain provisions of the Constitution may be amended by a simple majority in Parliament. Others may be amended by two-thirds majority. The third category relates to provisions where amendments must be ratified by one-half of the States. This scheme strikes a good balance by protecting the rights of the States while leaving the remainder of the Constitution easy to amend. Of the three ways of amending the Constitution two are laid down in Article 368 itself and the third is provided for in about 24 other Articles.

880. The Constitution Adviser incorporated in his draft Constitution prepared by him in October, 1947 a recommendation contained in the supplementary Report of the Union Constitution Committee. Following the recommendation of the Advisory Committee he included a proviso that the provisions in the Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes, the Indian Christians and the Sikhs, either in the Federal Parliament or in any Provincial Legislature, should not be amended before the expiry of ten years from the commencement of the Constitution.

881. The Drafting Committee in February, 1948 considered the provisions for amendment. It made three material changes in the provisions made by the Constitution Adviser. First, the Committee framed a self contained and independent Article regarding the reservation of seats in the legislatures for minorities. These provisions could not be amended for a period of ten years and would then cease to have effect unless continued in operation by an amendment of the Constitution. The second proposed change gave a limited power of initiating constitutional amendments to the

State legislatures. This power related to two matters. These were the methods of choosing Governors and the establishment or abolition of Legislative Councils in the States. The third amendment suggested was that changes in any of the legislative lists (not merely federal List) should receive ratification of at least one-half of the Provincial legislatures and one-third of the legislatures of Indian States.

882. The entire history of the power of amendment of the Constitution shows First that the Draft Constitution eliminates the elaborate and difficult procedures such as a decision by convention or a referendum. The powers of amendment are left with the legislatures of the Union and the States. Secondly, it is only for amendments of specific matters that the ratification by the State legislatures is required. All other Articles are left to be amended by Parliament with only limitation of majority of not less than a two-thirds of the members of each House present and voting and the majority of the total membership of each House. Thirdly, the provisions for amendment of the Constitution were made simply and not difficult when comparison is made with the American and the Australian Constitutions.

883. The theory of inherent and implied limitations on the amending power is based on the assumption of a narrow and restricted meaning of the word amendment to suggest that the basic features or the essential features and the democratic republican character of the Constitution cannot be damaged and destroyed Emphasis is laid on the Preamble of the Constitution to suggest that inherent and implied limitations all spring from the Preamble. The Preamble is said not to be a part of the Constitution. The Preamble is said to be unalterable. Therefore, it is contended that other provisions which gave effect to the Preamble cannot be amended.

884. Reliance is placed on the decision of this Court in *Berubari's case*[35] in support of the proposition that the Preamble is not a part of the Constitution. The conclusion drawn is that no amendment of the Constitution inconsistent with the Preamble can be made. The Preamble is said to be an implied limitation on the power of amendment. This Court in *Berubari's case* (supra) said that the Preamble has never been regarded as the source of any substantive power, because such powers are expressly granted in the body of the Constitution. This Court said "what is true about the power is equally true about prohibitions and limitations". In *Berubari's case* (supra) it was suggested that the Preamble to the Constitution postulated that like a democratic republican form of the Government the entire territory of India was beyond the reach of Parliament and could not be affected either by ordinary legislation or even by constitutional amendment. The Preamble was invoked to cut down the power to cede territory either by ordinary law or by amendment of the Constitution. This Court said that the Preamble is, in the words of story "a key to open the minds of the makers, but nevertheless the Preamble could not be said to postulate a limitation on one of the very important attributes of Sovereignty". This Court rejected the theory that the Preamble can impose serious limitations on the essential attribute of sovereignty. The suggested limitation that the Preamble affirmed the inviolability of the territory of India so that the power of amendment should be implied (*sic*) limited to exclude the ceding territory, is negatived by this decision.

---

[35] (1960) 3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

885. The petitioner's contention that the Preamble is not a part of the Constitution is nullified by the petitioner's reference to and reliance on the Preamble as the source of all inherent limitations. The *Berubari's case* (supra) held that Article 1 could be amended under Article 368 and a part of the territory of India could be ceded by such amendment. The Preamble did not limit the power to cede territory by amendment of Article 1.

886. In the *Berubari's case* (supra) there is an observation that the Preamble is not a part of the Constitution. The Preamble was taken up by the Constituent Assembly at the end as it had to be in conformity with the Constitution. The Preamble was debated and voted upon and the motion "The Preamble stand part of the Constitution" was adopted. Therefore, Mr. Seervai rightly contended that the Preamble is an integral part of the statute. The Preamble can be repealed (See *Craies on Statute*, 6th Ed., page 200 seq. and *Halsbury Laws of England*, 3rd Ed., Vol. 36, p. 370).

887. In *Gopalan's case*[36] an argument was advanced on the Preamble that the people gave themselves guaranteeing to the citizens fundemental rights, and, therefore, the provisions of Part III must be construed as being paramount to the legislative will as otherwise the fundamental rights to life and personal liberty would have no protection against legislative action. Patanjali Sastri, J., said that the high purpose and spirit of the Preamble as well as the constitutional significance of a declaration of Fundamental Rights should be borne in mind. The language of the provisions, it was said there, could not be stretched in disregard of the cardinal rule of interpretation of any enactment, constitution or other, that its spirit no less than its intendment should be collected primarily from the natural meaning of the words used. The words "procedure established by law" in Article 21 must be taken to refer to a procedure which had a statutory origin. The word "law" was said not to mean the immutable and universal principle of natural justice. The reasoning given by Patanjali Sastri, J., was "no procedure is known or can be said to have been established by such vague and uncertain concepts as the immutable and universal principles of natural justice". This Court in *Gopalan's case* (supra) refused to read due process as an implication of the Constitution.

888. In the *Kerala Education Bill, 1957 case*[37], Das, C. J., referred to the Preamble and said "to implement and fortify the supreme purpose set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights". In the same case, Das, C. J., said "so long as the Constitution stands as it is and is not altered, it is inconceiveably the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority community who are of our own". This observation shows that fundamental rights can be amended and the Preamble does not stand in the way.

889. In *Basheshar Nath* v. *The C. I. T., Delhi*[38], Bhagwati, J., referred to the Preamble in discussing the question of waiver of fundamental right and compared our Preamble to the Preamble to the United States Constitution. The Preamble to the American Constitution is without the Bill of Rights and the Bill of Rights which became part of the United States Constitution substantially altered its character and broadly speaking, differed in no way, in principle, from our fundamental rights.

---

[36] 1950 SCR 88: AIR 1950 SC 27: 1950 SCJ 174.

[37] 1959 SCR 995: AIR 1958 SC 956: 1959 SCJ 321.

[38] 1959 Supp 1 SCR 528: AIR 1959 SC 149: (1959) 35 ITR 190.

890. The Preamble is property resorted to where doubts or ambiguities arise upon the words of the enacting part. If the enacting words are clear and unambiguous, there is little room for interpretation, except the cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the Preamble. This is the view of Story. The Preamble can never be resorted to enlarge the powers confided to the general government. The Preamble can expound the nature, extent and application of the powers actually conferred by the Constitution and not substantively create them.

891. The decisions of this Court in *Gopalan's case* (supra), the *Coal Bearing Areas Act case*[39] and *State of Rajasthan* v. *Leela Jain*[40], are that if the language of the enactment is clear the Preamble cannot nullify or cut down the enactment. The Judicial Committee in *The Secretary of State for India in Council* v. *Maharajah of Bobbili*,[41] said that the legislature may well intend that the enacting part should extend beyond the apparent ambit of the Preamble or the immediate mischief. See also *Attorney-General* v. *Prince Ernest Augustus of Hanova* [42]. The American decision in *Henning Jacobson* v. *Commonwealth of Massachusetts*,[43] indicates that power is not conferred by the Preamble but must be found in the Constitution.

892. The Preamble may be relevant in the case of an ambiguity in an enactment in a statute. A statute does not contain an amending power for the simple reason that the statute can be amended under legislative power. The Attorney-General rightly said that the Preamble in a Constitution refers to the frame of the Constitution at the time of the Preamble, and, therefore, it can possibly have no relevance to the Constituent power in the future, when that Constitution itself can be changed. The position would be the same so far as the Preamble is concerned whether the constituent power is exercised by the amending body provided for by the people themselves in the Constitution or by referendum, if so provided for in the Constitution. The Attorney-General supported his submission by relying on the views of Canaway and Wynes on the similar interpretation of Section 128 of the Australian Constitution.

893. Canaway in the *Failure of Federalism in Australia* in discussing Section 128 of the Australian Constitution under the heading "Alteration of the Constitution" expresses the view that the section must be read as a substantive grant of power to alter the Constitution and that the negative form of the section in no way detracts from the amplitude of that power. Canaway further says that it is not permissible to refer to the Preamble in connection with the effect of Section 128 and if nevertheless such reference is made there is nothing adverse to the conclusion that there is full power of amendment. The Preamble recites a preliminary agreement to unite in one indissoluble Federal Commonwealth. Section 128 of the Australian Constitution forms an integral part of the Constitution. As from the time of the agreement it must have been contemplated that the Constitution should be alterable to the full extent of power conferred by that section. Therefore, the word "alter" in Section 128 of the Australian Constitution is not restricted by any reference to the Preamble.

894. Wynes in *Legislative, Executive and Judicial Powers in Australia*, 4th Ed., at pp. 505-506 expresses the view that apart from the rule which excludes the Preamble generally from consideration in statutory interpretation it is clear that, when all is said and done, the Preamble at the most is only a recital of a present intention. The insertion of an express reference to an amendment in the Constitution itself is said to operate as a qualification upon the mere recital of the reasons for its creation.

---

[39] 1962 1 SCR 44: AIR 1961 SC 954: (1962) 2 SCJ 216.

[40] (1965) 1 SCR 276 : AIR 1965 SC 1296: (1966) 1 SCJ 37.

[41] ILR 43 Mad 529: AIR 1919 PC 52: 46 IA 302.

[42] 1957 AC 436.

[43] 197 US 11.

895. At the second reading of the Draft Constitution in the Constituent Assembly a resolution was adopted that the Preamble do form part of our Constitution. The Preamble is a part of the Constitution. On November 26, 1949 certain Articles of the Constitution were brought into force. Article 393 did come into force on November 26, 1949. Therefore, the Preamble did not come into force on November 26, 1949. As regards general laws the position is that the Preamble has been treated as part of the statute.

896. Clear constitutional provisions are imperative both on the Legislatures and the Courts. Where a constitutional provision is comprehensive in scope and leaves no room for interpretation the Court is without power to amend, add to or detract from a constitutional provision or to create exceptions thereof by implication (See *Corpus Juris Secumdum*, Vol. 16, p. 65). Where the people express themselves in careful and measured terms in framing the Constitution and they leave as little as possible to implications, amendments or changes in the existing order or conditions cannot be left to inserting implications by reference to the Preamble which is an expression of the intention at the time of the framing of the Constitution. Therefore, the power to amend the Constitution is not restricted and controlled by the Preamble.

897. The contention that essential features are not amendable under Article 368 as it stood before the Constitution 24th Amendment Act is not only reading negative restrictions on the express power of amendment but is also putting the clock back. One of the salutary principles of construction of a statute is to be found in *R.* v. *Burah*.[44] It was a case to determine whether the prescribed limitations of a colonial legislature had been exceeded. The Judical Committee said that a duty must be performed by looking to the terms of the instrument by which affirmatively legislative powers are created, and by which, negatively, they are restricted. "If what has been done is legislation within the general scope of the affirmative words which give power, and if it violates no express condition or restriction by which that power is limited, it is not for any court of justice to enquire further or to enlarge constructively those conditions and restrictions". The maxim *Expressum facit cessare tacitum* was similarly applied in *Webb* v. *Outrim*.[45] The theory of implied and inherent limitations can be best described as a subtle attempt to annihilate the affirmative power of amendment. Lord Halsbury in *Fielding* v. *Thoms*,[46] said that if the legislature had full power to make laws it was difficult to see how the power was taken away. The power is always sufficient for the purpose. Lord Dunedin in *Whiteman* v. *Sadler*,[47] said "express enactment shuts the door to further implication".

898. It was said that the essential features could be amended by way of improvement but could not be damaged or destroyed. It was said India could not be converted into a totalitarian dictatorship. The entire approach of the patitioner to the power of amendment contained in Article 368 ignores the fact that the object of the Constitution is to provide for the organs of

---

[44] 3 AC 889.

[45] 1907 AC 89.

[46] 1896 AC 600.

[47] 1910 AC 514.

State like the judicature, legislature and the executive for the governance of the country. Apart from the essential functions of defence against external aggression and of maintenance of internal order a modern State is organised to secure the welfare of the people. India is a sovereign democratic republic which means that Parliament and State legislatures are elected on adult universal suffrage. The country is governed by the Cabinet system of government with ministries responsible to the House of the People and to the Legislative Assemblies respectively. In a democracy the determination of policies to be pursued can only be determined by a majority vote cast at election and then by a majority of the elected representatives in the legislature. Holmes, J., said "In a democracy the people have the right to embody their opinion in law".

899. The argument that if unbridled power were conferred the Constitution could be subverted or destroyed is not supported by actual experience in India. Mr. Seervai embhasised that since 1951 when *Shankari Prasad's* case (supra)recognised unlimited power of amendment till *Golak Nath's case* (supra) in 1967 the normal democratic process of the departments of the State functioned as provided by the Constitution. Elections have been held as provided by the Constitution. If any body or organised party were bent upon subverting our free Constitution, then even if there were no power of amendment. Parliament has powers which would enable such destruction to be brought about. Great and wide powers are conferred for the governance of great sovereign countries and such powers cannot be withheld on the ground that they may be used externally or oppressively. Well settled principles of construction in interpreting constitutions preclude limiting the language of the Constitution by political, juristic or social concepts independently of the language of the Constitution to be interpreted. This Court in *Deep Chand* v. *State of Uttar Pradesh & Others*,[48] relied on the test laid down in *Queen* v. *Burah*,[49] that the terms of the instrument by which affirmatively the powers are created, and by which they are negatively restricted are to be looked into. The Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for Canada*,[50] tersely stated the legal principle as follows: "If the text is explicit the text is conclusive, alike in what it directs and what it forbids". This is the golden rule of construction of a written Constitution.

900. In *Gopalan's case* (supra) this Court was invited to read into the Constitution implications derived from the "spirit of the Constitution". Kania, C.J , said that to strike down the law on an assumed principle of construction would be "to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights". Kania, C. J., also said that a large and liberal interpretation should be given to the Constitution. That does not mean that a Court is free to stretch or pervert the language of the Constitution in the interest of any legal or constitutional theory. This Court in *Keshavan Madhavan Menon* v. *The State of Bombay*[51] rejected the contention that the spirit of the Constitution should be invoked in interpreting the Constitution. In *Benoari Lal Sharma's case*[52] the Privy Council reversed the judgment of the Federal Court observing that questions of jurisprudence or policy were not relevant to the construction of power conferred in an affirmative language and not restricted in any negative terms.

---

[48] 1959 Supp 2 SCR 8: AIR 1959 SC 648: 1959 SCJ 1069.

[49] (1878) 5 IA 179.

[50] 1912 AC 571.

[51] 1951 SCR 228: AIR 1951 SC 128: 1951 SCJ 182.

[52] 72 IA 57.

901. A constitution is essentially a frame of government laying down governmental powers exerciseable by the legislature, executive and the judiciary. Even so other provisions are included in the Constitution of a country which provisions are considered by the framers of that Constitution to have such special importance that those should be included in the Constitution or organic law. Thus all provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself. The Attorney-General rightly said that if the positive power of "amendment of this Constitution" in Article 368 is restricted by raising the walls of essential features or core of essential features, the clear intention of the Constituent Assembly will be nullified and that would make a mockery of the Constitution and that would lead to destruction of the Constitution by paving the way for extra constitutional or revolutionary changes in the Constitution. The theory of implied and inherent limitations cannot be allowed to act as a *boa constrictor* to the clear and unambiguous power of amendment.

902. If there is no express prohibition against amendment in Article 368 the omission of any such restriction did not intend to impose any restriction. When certain restrictions are imposed it is not intended that other undefined restrictions should be imposed by implication. The general rule is not to import into statutes words which are not found there. Words are not to be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context. If a matter is altogether omitted from a statute it is not allowable to insert it by implication. Where the language of an Act is clear and explicit effect is to be given to it whatever may be the consequences. The words of the statute speak the intention of the legislature. Where the reading of a statute produces an intelligible result there is no ground for reading any words or changing any words according to what may be supposed intention of the legislature. If a statute is passed for the purpose of enabling something to be done but omits to mention in terms some detail which is of great importance to the proper performance of the work which the statute has in contemplation the courts are at liberty to infer that the statute by implication empowers the details to be carried out. The implication is to empower the authority to do that which is necessary in order to accomplish the ultimate object.

903. The implication sought to be raised by Mr. Palkhivala is for the purpose of reading negative words into Article 368 to destroy the positive power to amend. The provisions of our Constitution in the light of historical background and special problemes of the country will show that no provision can be considered as non-essential. The Constitution-makers did not think so. The Attorney-General rightly contended that no one has the power or authority to say that any single provision is more essential than another or that the amending power under Article 368 does not operate on any provision on the ground of alleged essentiality when Article 368 provides amendment of this Constitution which obviously means the whole Constitution including every provision. In a Constitution different methods of amendment may be laid down depending upon the degree of importance attached to particular parts of the Constitution. Apart from the language of Article 368 the draft Constitution as it emerged through the Constituent Assembly shows that no provision of the Constitution was excepted from the amending power.

SCC Online

904. The provisions for the purpose of amendment were divided into four categories. The first two categories are to be found in Article 368. Certain provisions requires ratification by the requisite number of States as are mentioned in the proviso. Other provisions which do not fall within the proviso are amendable by a double majority provided there. The third category consists of Articles 4, 169, 240(1), Paragraph 7, Schedule 5, and Paragraph 21, Schedule 6. The fourth category consists of provisions which were said by the Attorney-General to confer enabling power on Parliament to change the provisions by the expression "unless Parliament otherwise provides" or similar expression. He gave the examples which are Articles 73 (2), 103(3), 105(3), 118(2), 120(2), 125, 133(3), 171(2), 189(3), 194(3), 210(2), 241(2), 283(1) and (2), 285(1) and (2), 343(3), 345 and 348(1).

905. The character of the provisions which are amendable under the proviso to Article 368 itself shows that the petitioner's submission that essential features are unamendable is a baseless vision. Article 54 speaks of the method of election of the President. This may be changed. The manner or scale of representation of the different States in regard to the election of the President may also be changed. The executive power of the Union and the States may be changed. Chapter IV of Part V (the Union Judiciary), Chapter V of Part VI (the High Courts in the States) are also mentioned in Article 368 as liable to be changed. Article 141 may also be changed. Chapter I of Part XI and the Seventh Schedule (legislative relations between Union and the States) may be changed. The representation of the States in Parliament (Articles 80 and 81) may be changed. The number of representation may be increased or reduced. The method of election of such representatives as Parliament may by law prescribe and the number of the members of the House of the People may be increased or reduced. The method of election to the House of People may be changed. Finally the provisions of Article 368 itself, which is the most important part of the Constitution may be changed.

906. To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. Who is to judge what the essential features are ? On what touchstone are the essential features to be measured ? Is there any yardstick by which it can be gauged ? How much is essential and how much is not essential ? How can the essential features or the core of the essential features be determined ? If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredicatable and indeterminate task. There must be an objective data and standard by which it can be predicated as to what is essential and what is not essential. If Parliament cannot judge these features Parliament cannot amend the Constitution. If, on the other hand, amendments are carried out by Parliament the petitioner contends that eventually court will find out as to whether the amendment violates or abridges essential features or the core of essential features. In the ultimate analysis it is the Court which will pronounce on the amendment as to whether it is permissible or not. This construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the courts.

907. Mr. Palkhivala said that though the essential features could be amended the core of essential features could not be amended. He said that there was no esoteric test to find out what is essential and what is not essential and if no precise definition could be given that was no reason to hold that the essential features and the core of essential features could be amended. It was said that the appreciation of the trained judicial mind is the only way to find out what essential features are.

908. Mr. Seervai rightly contended that there is no foundation for the analogy that just as Judges test reasonableness in law, similarly the judicial mind will find out the essential features on the test of reasonableness. Reasonableness in law is treated as an objective criterion because reason inheres in man as rational being. The citizen whose rights are affected applies reason and when he assails a law he possesses a standard by which he can persuade the Court that the law is unreasonable. The legislature which makes a law has the standard of reasonableness and has the further qualification to apply the standard because of familiarity with the needs, desires and the wants of the people whom the legislature represents. As regards the Judge not only does he share the reasonableness of the reasonable man but his trained mind enables him to see certain aspects clearly. The process of judicial review of legislation as laid down by Courts is that the Court will start with the presumption that laws enacted are reasonable. The objective standard is reasonableness. That is why in the law of contract reasonable price is to be ascertained by the Courts. In the law of torts the Courts find out what reasonable care is. In the law of property reasonable conduct is found out by the Courts to avoid evil consequences. Reasonableness is to be judged with reference to the right which is restricted when Article 19 is considered.

909. The American Courts evolved a test of reasonableness by the doctrine of substantive due process which means not that the law is unreasonable but that on political, social and economic grounds the majority of Judges consider that the law ought not be permitted to be made. The crucial point is that in contradistinction to the American Constitution where rights are couched in wide general terms leaving it to the Courts to evolve necessary limitations our Constitution limited it by precise words of limitation as for example in Articles 19 and 21. In Article 21 the Constitution-makers substitued "procedure established by law" for the words "due process of law". The reason for the change was that the procedure established by law was specific. The framers of the Constitution negatived the vague undefinite reasonableness of laws on political, social and economic grounds. In *Gopalan's case* (supra) due process was rejected, by clearly limiting the rights acquired and by eliminating the indefinite due process. The Constitution-makers freed judicial review of subjective determination. Due process as a test of invalidity of law was deliberatively withheld or denied. Courts are not concerned with the wisdom or policy of legislation. The Courts are equally not concerned with the wisdom and policy of amendments to the Constitution.

910. Reliance was placed by Mr. Palkhivala on *Ridge* v. *Baldwin*,[53] where it is said that opinions that natural justice is so vague as to be practically meaningless, are tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. In the same case it was said that the idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law. Extracting those observations it was said by Mr. Palkhivala that though the border-line between essential features and nonessential features could not be stated or it was not possible to specify exhaustively the amendment which could be invalid on that principle yet there was no reason why the principle of inherent and implied limitations to amend our Constitution should not be accepted. Inherent and implied limitations cannot originate in an oracle when the Constitution does not contain any express prohihition against amending any provision. When Article 368 speaks of changes in the provisions of the Constitution as are set out in clauses (*a*) to (*d*) of the proviso it is manifest that the makers of the Constitution expressed their intention with unerring accuracy that features which can broadly be described as federal features, and from that point of view "Essential features" could be amended. In the face of these express provisions it is impossible to hold that the Constitution does not contemplate an amendment of the so-called essential features of the Constitution. The proviso confers that power with relation to the judiciary, the executive and the legislature, none of which could be said to be inessential. Indeed it is difficult to imagine that the Constitution contained any provision which was inessential. It need be hardly said that amendment not only means alteration, addition or repeal of provision but also deletion of some part, partial repeal and addition of a new part.

---

[53] 1964 AC 40.

911. It was said that if our Parliamentary system was changed to a Presidential system it would be amending the core of our Constitution. But such a change is permissible under Article 368. Whether the people would adopt such an amendment is a different matter and does not fall for consideration here. The core of the federal form of government in our country is greater power in the Union Parliament than States for preserving the integrity of the country. There can be changes by having a confederation or by conferring greater power on the Centre. These contentions about unamendability of essential features do not take into consideration that the extent and character of any change in the provisions of the Constitution is to be determined by legislatures as amending bodies under Article 368 and as representatives of the people in a democracy and it is not the function of the Courts to make any such determination.

912. Mr. Palkhivala contends that the Constitution 24th Amendment Act, is unconstitutional because Parliament cannot exceed the alleged implied and inherent limitations on the amending power as it stood before the 24th Amendment. The 24th Amendment has substituted the marginal note "Power of Parliament to amend the Constitution and procedure therefor" for the original note "procedure for amendment of the Constitution". This change is due to the fact that according to the leading majority judgment in *Golak Nath's case* (supra) the unamended Article dealt only with the procedure for amendment and that the power of amendment was in the residuary power of legislation. The 24th Amendment has declared that the power to amend the Constitution is in Article 368. That was the view of this Court in earlier decisions. That was the minority view in *Golak Nath's case* (supra). By amendment that view has become the constitutional mandate.

913. The other change as a result of the 24th Amendment is that "Parliament may in the exercise of its constituent power amend" in place of the words "amendment of this Constitution may be initiated". The reasons for this change are to give effect to the decisions of this Court in *Sankari Prasad's case* (supra) which in considering the validity of the First

Amendment recognised and affirmed the vital distinction between constituent power and legislative power and decided that the word "law" in Article 13(2) applied to the exercise of legislative power and did not apply to an amendment of the Constitution. In *Sajjan Singh's case* (supra) the same distinction was upheld by the majority of this Court. In *Golak Nath's case* (supra) the majority and the concurring judgment denied the distinction between legislative and constituent power and held that Article 13(2) applied to an amendment of the Constitution under Article 368 because there was no distinction between legislative and constituent power. As a consequence the leading majority judgment in *Golak Nath's case* (supra) held that Parliament could not amend fundamental rights. The dissenting judgments in *Golak Nath's case* (supra) upheld the vital distinction between legislative and constituent powers and held that the decision in *Sankari Prasad's case* (supra) and the majority decision in *Sajjan Singh's case* (supra) were correct and that Parliament had power to amend the fundamental rights since an amendment of the Constitution was not law within the meaning of Article 13(2). These features give the reason why the expression "Parliament may in the exercise of constituent power" was introduced by the 24th Amendment. Parliament took notice of two conflicting views and the unamended Article 368. Parliament took notice of the preponderating judicial opinion in favour of the view that Article 368 contained the power of amendment and that power was a constituent power. Wanchoo, J., held that the power under Article 368 is constituent power to change the fundamental law, that is to say the Constitution. The constituent power under the Constitution belonged to Parliament because the Constitution gave it. The 24th Amendment made explicit what the judgment in *Sankari Prasad's case* (supra) and the majority judgment in *Sajjan Singh's case* (supra) and the dissenting judgment in *Golak Nath's case* (supra) said, namely, that Parliament has the constituent power to amend the Constitution.

914. The unamended Article used the words "An amendment of this Constitution". The 24th Amendment used the words "Parliament may ....amend by way of addition, variation or repeal any provision of this Constitution". This has been done because the leading majority judgment in *Golak Nath's case* (supra) expressed the view that there is considerable force in the argument that the expression "amendment" in Article 368 has a positive and negative content in exercise of which Parliament cannot destroy the structure of the Constitution but it can only modify the provisions thereof within the framework of the original instrument for its better effect. This observation in *Golak Nath's case* (supra) raised a doubt as to the meaning of the word "amedment". The 24th Amendment has expressly clarified that doubt.

915. The leading majority judgment and the concurring judgment in *Golak Nath's case,* (supra) both held that the fundamental rights could not be amended by Parliament. The leading majority judgment with reference to the meaning of the word "amendment" and without deciding the matter observed that there was great force in the argument that certain fundamental features e.g., the concept of federalism, the institutions of the President and the Parliamentary executive could not be abolished by amendment. *Sankari Prasad's case,* (supra) *Sajjan Singh's case* (supra) and the dissenting minority judgment in *Golak Nath's case* (supra) took the view that every provision of the Constitution could be amended in exercise of constituent power. As a necessary corollary, the 24th Amendment excludes the operation of Article 13 by amending Article 13 by a new sub-article (4) that nothing in Article 13 shall apply to any amendment of this Constitution under Article 368. The amendment of Article 13 by an insertion of sub-article (4) is also reinforced by the opening words introduced Article 368 by the 24th Amendment,

SCC Online

viz., notwithstanding anything contained in this Constitution which would certainly exclude Article 13.

916. The Constitution 24th Amendment Act raises three aspects. First, does the word "amend" include abrogation or repeal of the whole Constitution? Does amendment mean that there is some feature of the Constitution which cannot be changed. Secondly, what light does the proviso to Article 368 throw on the nature of the amending power and on the doctrine of inherent and implied limitations on the amending power that essential features of the Constitution cannot be damaged or destroyed. Thirdly, does clause (*e*) of the proviso to Article 368 enable Parliament and the requisite majority of the States to increase the power of Amendment that was conferred by Article 368.

917. Article 368 in the unamended form contained power as well as self executing procedure which if followed by the prescribed authorities would result in an amendment of the Constitution. Both the Attorney-General and Mr. Seervai rightly said that the words "Constitution shall stand amended" in Article 368 will exclude a simple repeal that is without substituting anything in place of the repealed Constitution. If the Constitution were totally repealed and a vacuum was created it could not be said that the Constitution stands amended. The Constitution means the mode in which a State is constituted or organised specially as to the location of sovereign power. The Constitution also means the system or body of fundamental principles according to which the nation, State and body politic is constituted and governed. In the case of a written Constitution, the Constitution is more fundamental than any particular law and contains a principle with which all legislation must be in harmony. Therefore, an amendment of the Constitution is an amendment of something which provides a system according to which a State or nation is governed. An amendment of the Constitution is to make fundamental changes in the Constitution. Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of Government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system.

917-A. However radical the change the amendment must provide for the mode in which the State is constituted or organised. The question which was often put by Mr. Palkhivala drawing a panorama of a totalitarian State in place of the existing Constitution can be simply answered by saying that the words "The Constitution shall stand amended" indicate that the Constitution of India is being referred to. The power of amendment is unlimited so long as the result is an amended Constitution, that is to say, an organic instrument which provides for the making interpretation and implementation of law.

918. The theory of unamendability of so-called essential features is unmeritorious in the face of express provisions in Article 368 particularly in clauses (*a*) to (*d*) of the proviso. Clauses (*a*) to (*d*) relate to 66 Articles dealing with some of the most important features of the Constitution. Those Articles relate to the judiciary, the legislature and the executive. The legislative relations between the Union and the States and the distributions of legislative power between them are all within the ambit of amendment.

919. The question which was raised by Mr. Palkhivala as to whether under proviso (*e*) to the unamended Article 368 the power of amendment could bo increased is answered in the affirmative. The reasons broadly stated are three.

920. *First*, under Article 368 proviso (*e*) any limitation on the power of amendment alleged to be found in any other Article of the Constitution can be removed. The full magnitude of the power of amendment which would have existed but for the limitation could be restored and the power of amendment increased. In *Golak Nath's case* (supra) the majority view was that Article 13(2) operated as a limitation on the power of amendment. The 24th Amendment took note of that decision and removed all doubts by amending Article 13(2) and providing a new sub-article (4) there and also by amending Article 368 to the effect that Article 13(2) shall not apply to any amendment of the Constitution If the express limitation which had been judicially held to constitute a bar to the amendment of fundamental rights could be removed by amending Article 368 under clause (*e*) to the proviso any other alleged implied limitation can be similarly removed.

921. Secondly, judicial decisions show that by amending the Article conferring the power of amendment a greater power to amend the Constitution can be obtained than was conferred by the original Article. In *Ryan case*[54] all the learned Judges excepting the Chief Justice held that by first amending Section 50 of the Irish Constitution which conferred the power of amendment subject to certain restrictions thereon so as to remove the restrictions contained in that section, the Irish Parliament effectively increased its power in the sense that an amendment could be made which those express restrictions would have prohibited. Again, in *Ranasinge's case*[55] it was said that a legislature has no power to ignore the conditions of law-making that are *imposed by the instrument which* regulates its power. This restriction created by the instrument exists independently of the question whether the legislature is sovereign or whether the Constitution is uncontrolled.' The Judicial Committee held that "such a Constitution can indeed be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provision". Thus a controlled Constitution can be converted into an uncontrolled constitution vastly increasing the power of amendment.

922. Thirdly, the power to amend the amending Article must include the power to add, alter or repeal any part of that Article and there is no reason why the addition cannot confer a power of amendment which the authorities named in Article 368 did not possess. By the exercise of the amending power provision can be made which can increase the powers of Parliament or increase the powers of the States. Again, by amendment future amendments can be made more difficult. The picture drawn by Mr. Palkhivala that a future amendment would be rendered impossible either by absolutely forbidding amendment or by prescribing an impractically large majority does not present any legal impediment to such an amendment. The safeguard against such action is external. The contingency of any such amendment being proposed and accepted is extremely remote because such an amendment might sow the seeds of revolution which would be the only way to bring about the change in the Constitution. The Solicitor-General rightly said that the effect of the amendment is that "it shall stand amended in accordance with the terms of the Bill". The product is not required to be "this Constitution". It will not be identically the old Constitution. It will be a changed or amended Constitution and its resemblance will depend on the extent of the change. More rigid process like referendum or initiative or greater majority or ratification by a larger number of States might be introduced by amendment.

---

[54] 1935 Irish Report 170.

[55] 1965 AC 172.

923. It is important to note that proviso (*e*) to Article 368, namely, the power to amend Article 368 is unlike perhaps some Constitutions which were before the Constituent Assembly when our Constitution was framed. Neither the American nor the Australian Constitution provided for any power to amend the amending provision itself. The Attorney-General rightly contended that this forcefully expresses a clear and deliberate intention of the Constituent Assembly that apart from providing for a less rigid amending formula the Constituent Assembly took care to avoid the controversy in America as to whether express limitation on Article V of the American Constitution itself regarding equal suffrage of the States in the Senate could be amended or the controversy in Australia as to whether Section 128 of the Australian Constitution itself could be amended as there was no express limitation on such amendment. The Constituent Assembly provided in clause (*e*) to Article 368 express and specific power of amendment of Article 368 itself.

924. The amplitude of the amending power in our Constitution stands in bold relief in comparison with Article V of the American Constitution, Section 128 of the Australian Constitution, and Section 50 of the Irish Constitution none of which confers such a power. Dr. Wynes in his *Legislative Powers in Australia* 4th Ed., p. 505 expresses the view that though Section 128 is negative in form but the power of amendment extends to alteration "of this Constitution" and this power is implied by its terms. Dr. Wynes also states that by the consent of the States the last part of Section 128 could be amended. This is only to illustrate as to how other Constitutions are understood by jurists in their countries. Our Article 368 contains no express limitation on the power of amendment. The provision of clause (*e*) in the proviso to Article 368 is not limited to federal features.

925. The words "amendment of this Constitution" in Section 50 of the Irish Constitution which formed the subject of decision in *Ryan's case* (supra) were read by Kennedy, C. J., in his dissenting view to mean that if power to amend Section 50 itself was intended to be given the framers of the Constitution would have said so. Mr. Palkhivala relied on this dissenting view. Other learned Judges who formed the majority held that the words "amendment of this Constitution" conferred power to amend that Section 50 as well. If no intention to amend that Section itself is expressed there is nothing which can be implied was the dissent. Therefore, it would follow even according to the dissent that no implied limitations on the power of amendment can be read in Section 50 if an express power of amendment has been conferred by the Constitution

926. Mr. Palkhivala contended that the people reserved the power to themselves to amend the essential features of the Constitution and if any such amendment were to be made it should be referred to the people by referendum. It was said that the Constitution-makers did not intend that essential features should be damaged or destroyed even by the people, and therefore, the Constitution did not provide for referendum. The other contention on behalf of the petitioner' was that referendum was not provided for because it might have been difficult to have the Constitution accepted on those terms. The secound view would not eliminate the introduction of referendum as a method of amendment. If a referendum were introduced by an amendment people would have complete power to deal with essential features. The other question would be as to whether the Preamble and the fundamental rights would be a limitation on the power of the people. On behalf of the petitioner it was said that it was not necessary to decide the questions. Both the Attorney-General and Mr. Seervai correctly said that the submissions made on behalf of the petitioner indicated that if essential features could be amended by the people the very fact that the Constituent Assembly did not include referendum as one of the methods of amendment and that the Constitution-makers excluded no part of the Constitution from amendment established that the amendment of a written Constitution can be legally done only by the method prescribed by the Constitution. If the method of referendum be adopted for purpose of amendment as suggested by Mr. Palkhivala that would be extra-constitutional or revolutionary. The amending body to amend the Constitution represents the will of the people.

927. Therefore, as long as Article 368 may be amended under Proviso (*e*) any amendment of the Constitution by recourse to referendum would be revolutionary. Mr. Palkhivala on behalf of the petitioner did not rely on the majority decision in *Golak Nath case* (supra) that the fundamental rights could be abridged or taken away only by convening a Constituent Assembly, but based his argument on a theory of legal sovereignty of the people. The Constitution is binding on all the organs of government as well as on the people. The Attorney-General rightly submitted that the concept of popular sovereignty is well settled in Parliamentary democracy and it means that the people express their will through their representatives elected by them at the general election as the amending body prescribed by the Constitution.

928. Are fundamental rights unamendable? Mr. Palkhivala contended that apart from Article 13(2) fundamental rights are based on Universal Declaration of Human Rights and are natural rights, and, therefore, they are outside the scope of amendment. In *Golak Nath case* (supra) the majority view declined to pronounce any opinion on alleged essential features other than fundamental rights. The concurring view was that fundamental rights were unamendable because they were fundamental. Wanchoo, J., for himself and two other learned Judges and Ramaswami, J., rightly rejected the theory of implied limitations. The three reasons given by Wanchoo, J., are these: First, the doctrine of essential and non-essential features would introduce uncertainty, Secondly, constituent power of amendment does not admit of any impediment of implied restrictions. Thirdly, because there is no express limitation there can be no implied limitation.

929. Mr. Seervai correctly contended that there is intrinsic evidence in the provisions of Part III itself that our Constitution does not adopt the theory that fundamental rights are natural rights or moral rights which every human being is at all times to have simply because of the fact that as opposed to other beings he is rational and moral. The language of Article 13(2) shows that these rights are conferred by the people of India under the Constitution and they are such rights as the people thought fit to be in the organised society or state which they were creating. These rights did not belong to the people of India before January 26, 1950 and could not have been claimed by them. Article 19 embodies valuable rights. Rights under Article 19 are limited only to citizens. Foreigners are human beings but they are not given fundamental rights because these rights are conferred only on citizens as citizens.

930. Article 33 enacts that Parliament may by law modify rights conferred by Part III in their application to Armed Forces. Parliament may restrict or abrogate any of the rights conferred by Part III so as to ensure the proper discharge of the duties of the Armed Forces and the maintenance of discipline among them. Therefore, Article 33 shows that citizens can be denied some of these rights. If these are natural rights these cannot be abrogated. Article 34 shows that Parliament may by law indemnify any person in respect of any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area. Article 34 again shows restriction on rights conferred by Part III while martial law is in force in any area. The dominant concept is social good. Where there is no restraint the society fails.

931. Articles 352 and 358 also illustrate as to how while the proclamation of emergency is in operation provisions of Article 19 are suspended during emergency. The framers of the Constitution emphasised the social content of those rights. The basic concept of fundamental right is therefore a social one and it has a social function. These rights are conferred by the Constitution. The nature of restriction on fundamental rights shows that there is nothing natural about those rights. The restrictions contemplated under Article 19(2) with regard to freedom of speech are essential parts of a well organised developed society. One must not look at location of power but one should see how it acts. The restrictions contemplated in Article 19 are basically social and political. Friendly relations with foreign states illustrate the political aspect of restrictions. There are similar restrictions on right to move freely. The protection of Schedule Tribes is also reasonable in the interest of society. This Court in *Basheshar Nath* v. *C. I. T. Delhi,*[56] said that there are no natural rights under our Constitution and natural rights played no part in the formulation of the provisions therein.

932. Articles 25 and 26 by their opening words show that the right to the freedom of religion is subject to the paramount interest of society and there is no part of the right however important to devotee which cannot and in many cases have not been denied in civilized society.

933. Subba Rao, C.J., in, *Golak Nath case* (supra) equated fundamental rights with natural rights or promodial rights. The concurring majority view in *Golak Nath case* (supra), however, said that there is no natural right in property and natural rights embrace the activity outside the status of citizen. Fundamental rights as both the Attorney-General and Mr. Seervai rightly contended are given by the Constitution, and therefore, they can be abridged or taken away by the people themselves acting as an organised society in a State by the representatives of the people by means of the amending process laid down in the Constitution itself. There are many Articles in Part III of our Constitution which cannot in any event be equated with any fundamental right in the sense of natural right. To illustrate Article 17 deals with abolition of untouchability. Article 18 speaks of abolition of titles. Article 20 deals with protection in respect of conviction for offences. Article 23 refers to prohibition of traffic in human beings and forced labour. Article 24 deals with prohibition of employment of children in factories, etc. Article 27 speaks of freedom as to liability for taxes levied for promotion of any particular religion. Article 28 contemplates freedom as to attendance at religious instruction or religious worship in certain educational institutions.

---

[56] 1959 Supp 1 SCR 528: AIR 1959 SC 149: (1959) 35 ITR 190.

Article 29 deals with protection of interests of minorities. Article 31(2) prior to the Constitution 25th Amendment Act spoke of payment of just equivalent for acquisition or requisition of property. Article 31(4) deals with legislation pending at the commencement of the Constitution. Article 31(5) and (6) save certain types of laws. Article 31-A saves laws providing for acquisition of estates etc. Articles 32 confers right to move the Supreme Court.

934. The Constitution is the higher law and it attains a form which makes possible the attribution to it of an entirely new set of validity, the validity of a statute emanating from the sovereign people. Invested with statutory form and implemented by judicial review higher law becomes juristically the most fruitful for people. There is no higher law above the Constitution.

935. Mr. Palkhivala relied on an article by Conrad on *Limitation of Amendment Procedure and the Constitutional Power*. The writer refers to the West German Provincial Constitution which has expressly excluded basic rights from amendment. If that is so the question of basic rights being unamendable on the basis of higher law or natural law does not arise. The conclusion of the writer is that whereas the American courts did not consider declaring a constitutional norm void because of a conflict with higher law the German Jurisprudence broadened the concept of judicial review by recourse to natural law. The post-war Constitution of West Germany distinguished between superior and inferior constitutional norms in so far as certain norms are not subject to amendment whereas others are.

936. The Attorney-General relied on Friedmann *Legal Theory*, 5th Ed., p. 350 seq. to show that there was a revival of natural law theory in contemporary German Legal Philosophy. This theory of natural law springs from the reaction against the excesses of the Nazi regime. The view of Friedmann is that natural law may disguise to pose itself the conflict between the values which is a problem of constant and painful adjustment between competing interests, purposes and policies. This conflict is resolved by ethical or political evolution which finds place in legislative policies and also on the impact of changing ideas on the growth of law.

937. Fundamental rights are social rights conferred by the Constitution. There is no law above the Constitution. The Constitution does not recognise any type of law as natural law. Natural rights are summed up under the formula which became common during the Puritan Resolution namely life, liberty and property.

938. The theory of evolution of positive norms by supra-positive law as distinguished from superior positive law had important consequences in the post-war revival of natural law in some countries particularly Germany. Most of the German Constitutions from the early 19th Century to the Nazi Regime did not provide for judicial review. Under the Weimar regime, the legislature reigned supreme and legal positivism was brought to an extreme. The reaction after World War II was characterised by decreases of legislative power matched by an increase of judicial power. It is in this context that Conrad's writing on which Mr. Palkhivala relied is to be understood. The entire suggestion is that norms could not only be judged by a superior law namely constitutional law but by natural law to broaden the scope of judicial review. The acceptance of the doctrine of judicial review has been considered as a progress in constitutional theory made between Declaration of Independence and the Federal Convention at Philadelphia.

939. On the one hand there is a school of extreme natural law philosopher's who claim that a natural order establishes that private capitalism is good and socialism is bad. On the other hand, the more extreme versions of totalitarian legal philosophy deny the basic value of the human personality as such. Outside these extremes, there is a far greater degree of common aspirations. The basic autonomy and dignity of human personality is the moral foundation of the teaching of modern natural law philosophers, like Maritain. It is in this context that our fundamental rights and Directive Principles are to be read as having in the ultimate analysis a common good. The Directive Principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The Directive Principles embody the set of social principles to shape fundamental rights to grant a freer scope to the large scale welfare activities of the State. Therefore, it will be wrong to equate fundamental rights as natural, inalienable, primodial rights which are beyond the reach of the amendment of the Constitution. It is in this context that this Court in *Bashsshar Nath* v. *C.I.T. Delhi* (supra) said that the doctrine of natural rights is nothing but a foundation of shifting sand.

940. Mr. Seervai rightly said that if the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws the democratic process and the co-ordinate nature of the great departments of the State are maintained. The democratic process is maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated. The democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power, or on the ground of violating a limitation on power, it is the duty of the Legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the legislatures to do so and the democratic will to prevail. This process harmonises with the theory of our Constitution that the three great departments of the State, the legislature, the judiciary and the executive are co-ordinate and that none is superior to the other. The normal interaction of enactment of law by the legislation, of interpretation by the courts, and of the amendment of the Constitution by the Legislature, go on as they were intended to go on.

941. If the power of amendment does not contain any limitation and if this power is denied by reading into the Constitution inherent limitations to extinguish the validity of all amendments on the principles of essential features of the Constitution which are undefined and untermed, the courts will have to lay down a new Constitution.

942. It it said that the frame of the Government cannot be changed or abrogated by amendment of the Constitution. There is before us no aspect of abrogation of the form of Government or of the changes apprehended by the petitioners like the abrogation of the judiciary or extending the life of Parliament.

943. The problems of the times and the solutions of those problems are considered at the time of framing the Constitution. But those who frame the Constitution also know that new and unforseen problemes any emerge, that problems once considered important may lose their importance because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another. Changes in the Constitution are thus actuated by a sense of duty to the people to help them get what they want out of life. There is no destiny of man in whose service some men can rightfully control others; there are only the desires and preferences and ambitions that men actually have. The duty to maximise happiness means that it is easier to give people what they want than to make them want what you can easily give. The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution.

944. The way in which the doctrine of inherent and implied limitations was invoked by Mr. Palkhivala in interpreting the Constitution was that the test of power under the Constitution must be to ascertain the worst that can be done in exercise of such power. Mr. Palkhivala submitted that if unbridled power of amendment were allowed the basic features of our Constitution, namely, the republican and/or democratic form of government and fundamental rights could be destroyed and India could be converted into a totalitarian dictatorship. The Court was invited to take into account the consequences of the kind described. Mr. Palkhivala suggested that a wide power of amendment would lead to borrowing words to the liquidation of our Constitution.

945. The Attorney-General rightly said that the unambigous meaning of amendment could not be destroyed to nurse the theory of implied limitations. He also said that the live distinction between power and exercise of power is subject to popular will and popular control. The theory of implied and inherent limitation was a repudiation of democratic process. The Attorney-General and Mr. Seervai also rightly said that the approach of the petitioner to the power of amendment contained in Article 368 of the Constitution ignores the fact that the object of the Constitution is to provide for departments of States like the judiciary, the legislature and the executive for the governance of a country. Apart from the essential functions of defence against external aggression and of maintenance of internal order a modern State is organised to secure the welfare of the people. Parliament and State legislatures are elected on adult universal suffrage. The country is governed by the Cabinet system of Government with ministries responsible to the Houses of Parliament and to the Legislative Assemblies.

946-47. In a democracy the determination of the right policies to be pursued can only be determined by a majority vote cast at election and then by a majority of the elected representatives in the Legislature. Democracy proceeds on the faith in the capacity to elect their representatives, and faith in the representatives to represent the people. The argument that the Constitution of India could be subverted or destroyed might have hortative appeal but it is not supportable by the actual experience in our country or in any country. The two basic postulates in democracy are faith in human reason and faith in human nature. There is no higher faith than faith in democratic process. Democracy on adult suffrage is a great experiment in our country the roots of our democracy are in the country and faith in the common man. That is how Mr. Seervai said that between 1951 when this Court recognised in *Sankari Prasad's case* (supra) unlimited power of amendment till *Golak Nath case* (supra) in 1967 the normal democratic process in our country functioned as provided by the Constitution.

948. The principle underlying the theory of taking consequences into account is best expressed in *Vacher & Sons* v. *London Society of Compositors*[57] where it was said that if any particular construction in construing the words of a statute was susceptible to more than one meaning, it was legitimate to consider the consequences which would result from any particular construction. The reason is that there are many things which the legislation is presumed not to have intended to bring about and therefore a construction which would not lead to any of these things should preferred to one which would lead to one or more of them.

949. The doctrine of consequences has no application in construing a grant of power conferred by a Constitution. In considering a grant of power the largest meaning should be given to the words of the power in order to effectuate it fully. The two exceptions to this rule are these: First, in order to reconcile powers exclusively conferred on different legistatures, a narrower meaning can be given to one of the powers in order that both may operate as fully as is possible. See *C. P. & Berar case,*[58] and *Province of Madras* v. *Governor-General,*[59] Second technical terms must be given their technical meaning even though it is narrower than the ordinary or popular meaning. *The State of Madras* v. *Gannon Dunkerly & Co.* (*Madras*) *Ltd*[60] In our Constitution powers are divided between federation and the States. An attempt must be made to find the power in some entry or other because it must be assumed that no power was intended to be left out.

950. The theory of consequences is misconstrued if it is taken to mean that considerations of policy, wisdom and social or economic policies are included in the theory of consequences. In *Vacher's case* (supra) it was said that the judicial tribunal has nothing to do with the policy of any Act and the only duty of the Court is to expound the language of the Act in accordance with the settled rules of construction. In *Attorney-General for Ontario* v. *Attorney-General for Dominions,*[61] the Privy Council refused to read an implication in the Constitution of Canada that there was no power to refer a matter for the advisory opinion of the highest Court because advisory opinions were prejudical to the correct administration of justice and were embarrassing to Judges themselves who pronounced them, for humanly speaking it would be difficult for them to hear a case on merits if they have already expressed an opinion. The Privy Council rejected this argument and said that so far as it was a matter of wisdom and policy it was for the determination of Parliament. In *Bank of Toronto* v. *Lambe,*[62] the Privy Council was invited to hold that the Legislature of a province could not levy a tax on capital stock of the Bank, for that power might be exercised to destory the Bank altogether. The Privy Council observed that if on a true construction of Section 92 of the British North America Act the power fell within the section, it would be wrong to deny its existence because by some possibility it might be abused.

951. The absurdity of the test of the worst that can be done in exercise of power is demonstrated by the judgment of Chief Justice Taft in *Grossman,*[63] where it was said that if those who were in separate control of each of the three branches of Government were bent upon defeating the action of the other, normal operations of Government would come to a halt and could be paralysed. Normal operations of the Government assume that all three branches must co-operate if Government is to go on. Where the meaning is plain the Court must give effect to it even if it considers that such a meaning would produce unreasonable result. In the *Bihar Land Reforms case*[64] Mahajan, J., said that agrarian laws enacted by the Legislature and protected by Article 31(3) and (4) provided compensation which might appear to the Court unjust and inequitable. But the Court gave effect to Article 31(3) and (4) because the results were intended and the remedy for the injustice lay with the Legislature and not with the Court. The contruction to avoid absurdity must be used with great caution.

---

[57] 1913 AC 107.
[58] 1939 FCR 18AIR 1939 FC 1.
[59] 72 IA 93.
[60] 1959 SCR 379: AIR 1958 SC 560: 1958 SCJ 696.
[61] 1912 AC 571.
[62] (1887) 12 AC 575.
[63] 69 L ED 527: 267 US 86.

952. In *Grundt's case*[65] it was said in choosing between two possible meanings of ambiguous words, the absurdity or the non-absurdity of one conclusion as compared with another might be of assistance and in any event was not to be applied as to result in twisting the language into a meaning which it could not bear.

953. The Attorney-General rightly submitted that if power is conferred which is in clear and unambiguous language and does not admit of more than one construction there can be no scope for narrowing the clear meaning and width of the power by considering the consequences of the exercise of the power and by so reading down the power. The question is not what may be supposed to be intended but what has been said. See *Ross* v. *Illison*[66] The Supreme Court in *Damselle Howard* v. *Illinois Central Rail Road Co.*,[67] said that you cannot destroy in order to save or save in order to destroy. The real import is that a new law cannot be made by construction. The question is one of intention. A meaning cannot be different which it cannot reasonably bear or will be inconsistent with the intention. The very basis of Parliamentary democracy is that the exercise of power is always subject to the popular will and popular control. The petitioner's theory of implied and inherent limitations is a repudiation of this democratic process. The underlying theory of democratic government is "the right of a majority to embody their opinion in law subject to the limitations imposed by the constitution," per Holmes, J., in *Lochner* v. *New York*.[68] In our Constitution Article 368 contains no express limitation on the amendment of any provision of the Constitution.

954. Mr. Palkhivala relied on the amending provisions in the Constitutions of America, Canada, Australia, Ireland and Ceylon and also decisions on the power of amendment in those countries in support of his submissions that a restricted meaning should be attributed to the word "amendment" and implied and inherent limitations should be read into the meaning and power of amendment.

955. Mr. Palkhivala also relied on the opinion of Cooley in a *Treatise on the Constitutional Limitations*, at pages 36-37 that "a written Constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition". This view of Cooley is not relevant to the amending power in Article V of the American Constitution. This view relates to the legislative power that a written Constitution is a limitation upon the powers of the Government, namely, the legislature, the executive and the judiciary.

---

[64] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 354.

[65] 1948 Ch 145.

[66] 1930 AC 1.

[67] 207 US 463.

[68] 198 US 45: 49 L Ed 937.

956. The other views of Cooley in *Constitutional Limitations* at pages 341-343, 345-348, 351-354 are these. First, except where the Constitution has imposed limitations upon the legislative power it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. Second, in the absence of constitutional restraint the legislative department of a State Government has exclusive and ample power and its utterance is the public policy of the State upon that subject, and the Courts are without power to read into the Constitution a restraint of the legislature with respect thereto. Third, if the Courts are not at liberty to declare statutes void because of their apparent injustice of impolicy, neither can they do so because they appear to the minds of the Judges to violate fundamental principles of republican Government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican Government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity. Fourth, the Courts are not at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.

957. Mr. Palkhivala relied on the views of George Skinner, published in 18 *Michigan Law Review* (1919-1920) pages 21-225 to build the theory of implied and inherent limitations. The views extracted are these. The power given by the Constitution cannot be construed to authorise a destruction of other powers in the same instrument. The essential form and character of the Government, being determined by the location and distribution of power, cannot be changed, only the exercise of governmental functions can be regulated. A somewhat different view of Skinner in the same Law Review is that it is not likely that the Supreme Court would put any limitations upon the power of Congress to propose amendments and in construing the Fifth Article it would be unwilling to say Congress had proposed an amendment which it did not deem necessary. The discretion is left entirely with Congress.

958. The other view on which Mr. Palkhivala relied is of William L. Marbury, published in 33 *Harvard Law Review* (1919-1920) at pp. 223-235. The views which Mr. Palkhivala extracted are that it may be safely premised that the power to amend the Constitution was not intended to include the power to destroy it. Marbury relies on *Livermore* v. *Waite*[69] where it is stated that the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

959. There are other views of Marbury on which the Attorney-General relied and which were not extracted by Mr. Palkhivala. Those views are that after excluding from the scope of its amending power in Article V of the American Constitution such amendments as take away legislative powers of the State there is still left a very broad field for its operation. All sorts of amendments might be adopted which would change the framework of the federal Government, the thing which the Constitution was created to establish, which would change the distribution of power among the various departments of that Government, place additional limitations upon them, or abolish old guarantees of civil liberty and establish new ones.

960. The Attorney-General also relied on the view of Frierson published in 33 *Harvard Law Review*, pp. 659-666 as a reply to Marbury. Frierson's view is that the security for the States was provided for by the provision for the necessity of ratification by three-fourths of the States. The Constitution committed to Congress and not to the Courts the duty of determining what amendments were necessary. The rights of the States would certainly be safer in the hands of three-fourths of the States themselves. This is considered by the framers of the Constitution to ensure integrity of States.

---

[69] 102 Cal 118.

961. The Attorney-General also relied on the view of McGovney published in Vol. 20 *Columbia Law Review.* McGovney points out a distinction between a political society or State on the one hand and governmental organs on the other to appreciate that constitutional limitations are against governmental organs. The writer's view is that an individual has no legal rights against a sovereign organised political society except, what the the society gives. The doctrine of national sovereignty means that people who made the existing distribution of powers between the federal and the State Governments may alter it. Amendment is left to legislatures because as a matter of convenience the legislatures generally express the will of the people. In the Constitution the people prescribe the manner in which they shall amend the Constitution. McGovney states that an amendment of a particular statute means usually it is a change germane to the subject-matter of that statute. Any change in the Government of the nation is germane to the Constitution. Any change altering the dispositions of power would, therefore, be germane to the purposes of the instrument. McGovney's view is that it is clear that no limitation on the amending power can be found in this notion of necessity for germaneness.

962. The Attorney-General also relied on an article *On the views of W. F. Dodd,* published in 30 *Yale Law Journal* p. 321 seq. and of H. W. Taft, published in 16 *Virginia Law Review* p. 647 seq. The view of Dodd is this. There are no implied limitations on the amending power. The Supreme Court in the *National Prohibition cases* rejected the arguments presented in favour of implied limitations. To narrow down the meaning of amendment or to adopt implied limitations would not only narrow down the use of the amending power but would also leave the question of amending power in each case to judicial decision without the guidance of any legal principle. Taft's view is that by reason of the Tenth Amendment which provided that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the People, the amending power in Article V of the American Constitution was not limited by the Tenth Amendment.

963. The question which has arisen on the Fifth Article of the American Constitution is whether there are implied limitations upon the power to amend. The two express limitations were these. First, no amendment which may be made prior to 1808 shall in any manner affect the First and the Fourth Clauses in the Ninth Section of the First Article. That limitation became exhausted by passage of time. The second express limitation is that no State without its consent shall be deprived of its equal suffrage in the Senate. The express limitation is to safeguard the equal representation of the smaller States in the Senate. The limitation can only be changed by unanimous consent of the States.

964. The 18th Amendment was vigorously attacked in the *National Prohibition Cases* on the ground that it overstepped alleged implied limitations on the Constitution amending power. The arguments advanced were these. First, the 18th Amendment which introduced prohibition was not in fact an amendment for an amendment is an alteration or improvement of that which is already contained in the Constitution and the term is not intended to include any addition of entirely new grants of power. Secondly, the amendment was not an amendment within the meaning of the Constitution because it is in its nature legislation and that an amendment of the Constitution can only affect the powers of government and cannot act directly upon the rights of individuals. Third, that the Constitution in all its parts looks to an indestructible nation composed of indestructible States. The power of amendment was given for the purpose of making alterations and improvements and any attempt to change the fundamental basis of the Union is beyond the power delegated by the Fifth Article. The decision in the ***National Prohibition Cases*** is that there is no limit on the power to amend the Constitution except that State may not without its consent be deprived of its equal suffrage in the Senate.

965. In ***Rhode Island*** v. ***Palmer***,[70] the 18th Amendment was challenged to be not within the purview of Article V. The judgment in ***Rhode Island case*** (supra) was that the amendment was valid. In ***Rhode Island case*** (supra) the grounds of attack were that the amendment was legislative in character and an invasion of natural rights and an encroachment on the fundamental principles of dual sovereignty but the contentions were overruled.

966. In ***Hawke*** v. ***Smith***[71] a question arose as to whether the action of the General Assembly of Ohio ratifying the 18th Amendment known as National Prohibition could be referred to the elections of the State under provisions of the State Constitution. It was held that these provisions of the State were inconsistent with the Constitution of the United States. The decision of the Court was unanimous. The two methods of ratification prescribed by Article V of the Constitution are by action of the legislatures of three-fourths of the States or conventions in the like number of States. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution. That power is conferred upon Congress. Article V was held to be plain and to admit of no doubt in its interpretation. The choice of means of ratification was wisely withheld from conflicting action in the several States.

967. Again, in ***Leser*** v. ***Garnett***[72] there was a suit to strike out the names of women from the register of voters on the ground that the State Constitution limited suffrage to men and that the 19th Amendment to the Federal Constitution was not validly adopted. The 19th Amendment stated that right of citizens to vote shall not be denied on account of sex. It was contended that the amending power did not extend to that situation. The Supreme Court there rejected that contention. The Supreme Court said that the function of a State legislature in ratifying the proposed amendment to the federal Constitution like the function of Congress in proposing the amendment is a federal function derived from the federal Constitution and it transcends any limitations sought to be imposed by the people of a State.

968. In ***United States*** v. ***Sprague***[73] a contention was advanced that the 10th Amendment recognised a distinction between powers reserved to the States and powers reserved to the people and that State legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several states. The 18th Amendment being of the latter character, the ratification by State legislatures was contended to be invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exceptions into it by implication.

---

[70] 253 US 350: 64 L Ed 947.

[71] 253 US 221.

[72] 258 US 130.

[73] 282 US 716.

969. The decisions in *Rhode Island* v. *Palmer*,[74] *Hawke* v. *Smith*,[75] *Leser* v. *Carnett*[76] and *United States* v. *Sprague*[76-a] are all authorities for the proposition that there is no implied limitation on the power to amend. The 18th Amendment was challenged on the ground that ordinary legislation could not be embodied in a Constitutional amendment and that the Congress cannot constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State. The 19th Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing. The Supreme Court brushed aside these arguments as wholly unworthy of serious attention and held both the amendments valid.

970. Mr. Palkhivala contended that the word "amendment" in Article 368 would take its colour from the words "change in the provisions" occurring in the proviso. The American decisions illustrate how the Supreme Court consistently rejected the attempts to limit the meaning of the word "amend" in Article V of their Constitution because of the reference to ratification by legislatures or conventions. Where words are read in their context there is no question of implication for context means parts that precede or follow any particular passage or text and fix its meaning.

971. The rule of *noscitur a sociis* means that where two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

972. This rule has been found to have no application to Article V of the American Constitution because conventions and legislatures are both deliberative bodies and if an amendment can be submitted either to the legislatures of States or to conventions at the absolute discretion of the Congress, it is difficult to say that the character of the amendment is in any way affected by the machinery by which the amendment is to be ratified. In *Rhode Island case* (supra) the contention that an amendment of the Constitution should be ratified by conventions and not by legislatures was rejected. In *Sprague case* (supra) the contention that matters affecting the liberty of citizens could only be ratified by conventions was not accepted and the Supreme Court refused to read any implication into Article V of the American Constitution. The Supreme Court said that in spite of the clear phraseology of Article V, the Court was asked to insert into it a limitation on the discretion conferred on it by the Congress. The Supreme Court did not accept any implied limitation. Where the intention is clear there is no room for construction and no excuse for interpolation or addition. In *Feigenspan* v. *Bodine*[77] it has been said when the people delegated the power of amendment to their representatives the power of amendment cannot be excluded in any way other than prescribed nor by any instrumentality other than there designated.

---

[74] 253 US 350 : 64 L Ed 947.

[75] 253 US 221.

[76] 258 US 130.

[76-a] 282 US 716.

[77] 264 F 186.

973. Mr. Palkhivala relied on some Canadian decisions the *Initiative and Referendum case*,[78] *Switzman* v. *Elbling*,[79] *Rex* v *Hess*,[80] and *Saumur* v. *City of Quebec and Attorney-General of Quebec*[81] and *Chabot* v. *School Commissioners of Lamorandiere and Attorney-General for Quebec*[82] in support of three propositions, first, unlimited legislative jurisdiction of the Dominion Parliament in Canada is under inherent limitation by reason of the preamble to the British North America Act which States that the Constitution is similar in principle to the United Kingdom. Second, the Dominion legislature cannot detract from the basic rights of freedom of speech and political association which are available in the United Kingdom. Third, rights which find their source in natural law cannot be taken away by positive law.

974. In the *Initiative and Referendum case* (supra) the Judicial Committee said that Section 92 of the British North America Act entrusted legislative power in a province to its legislature and to that legislature only. A power of legislation enjoyed by a provincial legislature in Canada can while preserving its own capacity intact seek the assistance of subordinate agencies as in *Hodge* v. *Queen*[83] the legislature of Ontario was held to be entitled to entrust to the Board of Commissioners authority to enact regulations. It does not follow that such a legislature can create and endow with its own capacity a legislative power. The *Initiative and Referendum case* (supra) decided that in the absence of clear and unmistakable language the power which the Crown possessed through a person directly representing the Crown could not be abrogated. The Lieutenant-Governor under the British North America Act referred to as the B.N.A. Act was an integral part of the legislature. The Initiative and Referendum Act was found to be one which wholly excluded the Lieutenant-Governor from legislative authority. The only powers of veto and disallowance preserved by the Initiative and Referendum Act were related to acts of Legislative Assembly as distinguished from Bills. Therefore, the powers of veto and disallowance referred to could only be those of the Governor-General under Section 90 of the B.N.A. Act and not the powers of the Lieutenant-Governor which are at an end when a Bill has become an Act. Section 11 of the Act provided that when a proposal for repeal of some law has been approved by majority of the electors voting that law is automatically to be deemed repealed, at the end of 30 days after the publication in the Gazette. Thus the Lieutenant-Governor appears to be wholly excluded from the legislative authority. The *Initiative and Referendum* decision related to an Act of the legislature and secondly to the Act being ultra vires the provisions of the B. N. A. Act. This is not at all relevant to the amending power of a Constitution. The Act was found to be invalid because the machinery which it provided for making the laws was contrary to the machinery set up by the B.N.A. Act. The impugned Act rendered the Lieutenant-Governor powerless to prevent a law which had been submitted to voters from becoming an actual law if approved by the voters. The impugned Act set up a legislature different from that constituted by the B.N.A. Act and this the Legislature had no power to do.

975. The other Canadian decisions are based on three views. The first view is based on the preamble to the B.N.A. Act that the Provinces expressed their desire to be federally united into one Dominion, with a Constitution similar to that of United Kingdom. The corollary extracted from the preamble is that neither Parliament nor Provincial legislatures may infringe on the traditional liberties because of the Preamble to the B.N.A. Act and a reference to British Constitutional History. The second view expressed in the decisions is that the basic liberties are guaranteed by implication in certain sections of the B.N.A Act. Section 17 establishes a Parliament for Canada. Section 50 provides that no House of Commons shall continue longer than five years. These sections are read by the Canadian decisions to mean that freedom of speech and freedom of political association should continue. The third view is that some rights find their source in natural law which cannot be taken away by positive law.

---

[78] 1919 AC 935

[79] 1957 Canada Law Report 285.
(1949) 4 Dominion Law Report 199.

[81] (1953) 4 DLR 641.

[82] (1958) 12 DLR 796.

[83] 9 App. Cas. 117..

976. The first view found expression in *Switzman's case* (supra). There was an Act respecting communistic propaganda. The majority Judges found that the subject-matter was not within the powers assigned to the Province by Section 92 of the B. N. A. Act. They further held that the Act constituted unjustifiable interference with freedom of speech and expression essential under the democratic form of government established in Canada. The Canada Elections Act, the B. N. A. Act provided for election of Parliament every five years, meeting of Parliament once a year. It was contended that it was implicit in all legislations the right of candidates to criticise, debate and discuss political, economic and social principles.

977. *Hess case* (supra) raised a question of jurisdiction of the Court to grant bail. Under Section 1025-A of the Criminal Code a person was detained in custody. Section 1025-A provided that an accused might be detained in custody without bail pending an appeal to the Attorney-General.

978. The *Saumur case* (supra) related to a municipal bye-law requiring permission for distribution of books and tracts in the city streets. The *Saumur case* (supra) relied on the observations of Duff, C. J., in *Re Alberta Legislation*[84] that the right of free public discussion on public affairs is the breath of life for Parliamentary institutions.

979. In *Chabot's case* (supra) public schools in the Province of Quebec were operated by School Commissioners elected by tax-payers of whom the religious majority were Catholics. A dissident tax-payer raised the question as to whether dissidents might establish their own schools or they might send them to a school of a neighbouring municipality and thereupon become exempt from paying tax. The majority held that certain regulations passed by the Catholic Committee were intra vires because they must be construed as confined to Catholic children.

980. The Canadian decisions show first that certain Judges relying on the Preamble to the B N.A. Act that the Canadian Constitution is to be similar in principle to that of the United Kingdom raised the vires of some of the legislations affecting freedom of speech. Secondly, the Canadian Constitution was given by the British Parliament and if the judges who used such dicta referred to that part of the Preamble they were emphasising that the rights of the Canadian people were similar to those in England. Thirdly, it has to be remembered that the Canadian Constitution has been developed through usage and conventions.

981. None of these decisions relates to amendment of the Constitution. None of these decisions indicates that there is any inherent limitation on the amendment of the Constitution. The Preamble to the B.N.A. Act shows that the Canadian Constitution enjoined observance of fundamental principles in British constitutional practice. The growth of the Canadian Constitution was through such usage and convention. Our Constitution is of a sovereign independent republican country. Our Constitution does not draw sustenance from any other Constitution. Our Constitution does not breathe through conventions and principles of foreign countries.

---

[84] (1938) 2 DLR 81 : 1938 SCR 100.

982. There are no explicit guaranteed liberties in the British North America Act. In Canada the constitutional issue in civil liberties legislation is simply whether the particular supersession or enlargement is competent to the Dominion or the Province as the case may be. Apart from the phrase "civil rights in the Province" in Section 92(13) there is no language in Sections 91 and 92 which even remotely expresses civil liberties, values.

983. The Canadian Bill of Rights assented to in 1960 in Section 2 states that every law of Canada shall unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights be so construed and applied as not to abrogate, abridge or infringe or authorise abrogation, abridgment or infringement of any of the rights of freedom recognised and declared. The view of Laskin in *Canadian Constitutional Law* (3rd Edition) (1969) is that in terms of legislative power the political liberties represent independent constitutional values which are exclusively in federal keeping. Since the enactment of the Canadian Bill of Rights the question has hardly any substantive effect because the Canadian Parliament can make a declaration in terms of Section 2 of the Bill of Rights that a law abrogating a freedom in the Bill of Rights is operative.

984. Mr. Palkhivala relied on the Australian decisions in *Taylor* v. *Attorney-General of Queensland*[85] and *Victoria* v. *Commonwealth*[86] in support of the proposition that there is inherent and implied limitation on the power of amendment.

985. In *Taylor's case* (supra) the Parliamentary Bills Referendum Act of 1908 was challenged. The Parliament Bills Referendum Act provided that when a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council, it may be submitted by referendum to the electors, and, if affirmed by them, shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if passed by both Houses of Parliament, and notwithstanding any law to the contrary. The Australian States Constitution Act, 1907 provided that it shall not be necessary to reserve, for the signification of His Majesty's pleasure thereon, any Bill passed by the legislature of any of the States if the Governor has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

986. In 1915 the Legislative Assembly of Queensland passed a Bill to amend the Constitution of Queensland by abolishing the Legislative Council. The Bill was passed by the Legislative Assembly. The Legislative Council rejected the Bill. The Legislative Assembly again passed the Bill. The Legislative Council again rejected the Bill. The Governor in accordance with the Parliamentary Bills Referendum Act, 1908 issued regulations providing for the taking of the Referendum Polls. It was argued that the Constitution ought to have been first amended.

---

[85] 23 CLR 457.

[86] 45 Australian Law Journal 251.

987. The questions for the opinion of the Court were: (1) is the Constitution Amendment Act of 1908 a valid and effective Act of Parliament ? (2) Is the Parliamentary Bills Referendum Act of 1908 a valid and effective Act of Parliament? (3) Is there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the Parliamentary Bills Referendum Act of 1908? (4) Was the Referendum valid?

988. The Colonial Laws Validity Act, 1865 in Section 5 conferred full power on every representative legislature to make laws respecting the constitution, power and procedures of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial laws for the time being in force in the said colony. The Parliamentary Bills Referendum Act was held to be an Act respecting the powers of the Legislature. Section 5 of the Colonial Laws Validity Act provided the authority for the legislation.

989. Mr. Palkhivala extracted three propositions from the *Taylor's case* (supra). First, probably the power to make laws respecting the Constitution, power and procedure of such legislature does not extend to authorise elimination of the representative character of the legislature within the meaning of the Act, p. 468 per Barton, J. Second, probably the representative character of the legislature is a basic condition of the power relied on, and is preserved by the word "such" in the collocation of words in the Constitution "of such legislature" p. 474 per Issacs, J. Third, when power is given to a Colonial Legislature to alter the Constitution of the legislature that must be read subject to the fundamental conception that consistently with the very nature of the Constitution as an Empire, the Crown is not included in the ambit of such power p. 474 per Issacs, J.

990. The decision in *Taylor's case* (supra) was to the effect that the Acts did not alter the representative character of the legislature as defined in Section 1 of the Colonial Laws Validity Act, 1865, nor did they affect the position of the Crown. The first two propositions on which Mr. Palkhivala relied, namely, the observations of Barton and Issacs, JJ., p. 468 and p. 474 were both prefaced by the word "probably" which amply shows that the observations are obiter. The question whether the representative character of the legislature could be changed or whether the Crown could be elminated did not call for decision. The other imarned Judges Gavan Duffy and Rich, JJ., said "It may perhaps be that the legislature must always remain a representative legislature as defined by the statute, but it is unnecessary in the present case to determine whether that is so or not".

991. Issacs, J., held in that case that the word "legislature" did not include the Crown because Section 7 of the Colonial Laws Validity Act used the expression "legislatures" followed by the words "or by persons or bodies of persons for the time being acting as such legislature" to show that the Legislature was exclusive of the Crown. The assent of the Queen or the Governor was thus regarded as an additional factor. Therefore, Issacs, J., said that when a power is given to the Colonial Legislature to alter the Constitution that must be read subject to the fundamental conception, that the Crown is not included in the ambit of such power. Those observations are made in the context of the provisions of the Colonial Laws Validity Act, where a "colony" is dejsned to include "all of Her Majesty's possessions abroad". The observations, therefore, mean that when power to alter the Constitution was conferred upon a colony which is a part of Her Majesty's possessions abroad it is reasonable to assume that such power did not include power to eliminate the Queen as a part of a colonial legislature.

992. The representative character of the Legislature does not involve any theory of implied limitation on the power of amendment. Such Legislature as was emphasised by Issacs,J., shows that the limitation on the power of amendment flowed from express language of Section 5 of the Colonial Laws Validity Act and was not dependent upon any implication.

993. In the *State of Victoria's case* (supra) the validity of the Pay Roll Tax Act, 1941 was impugned on the ground that it was beyond the legislative competence of the Commonwealth. The Pay Roll Tax Assessment Act, 1941-69 made the Crown liable to pay tax on the wages payble to named categories of employees of the State of Victoria. The Commonwealth Parliament, in the exercise of its power under Section 51(*ii*) of the Constitution to make laws with respect to taxation, but so as not to discriminate between States or parts of States was held competent to include the Crown in right of a State in the operation of a law imposing tax or providing for the assessment of a tax. The inclusion of the Crown in right of a State in the definition of "employer" in Section 3(1) of the Pay Roll Tax Assessment Act, 1941-1969 thus making a Crown in right of a State liable to pay the tax in respect of wages paid to employees including employees of departments engaged in strictly governmental functions was also held to be a valid exercise of the power of the Commonwealth under Section 51 of the Constitution. Section 114 of the Constitution enacts ban on the imposition by the Commonwealth of a tax on property of a State. This ban was not offended. A law which in substance takes a state or its powers or functions of Government as its subject-matter is invalid because it cannot be supported upon any grant of legislative power, but there is no implied limitation on Commonwealth legislative power under the Constitution arising from the federal nature of the Constitution. There was no necessary implication restraining the Commonwealth from making a law according to the view of three learned judges. Four other learned judges held that there is an implied limitation as lack of Commonwealth legislative power but the Act did not offend such limitation.

994. The limitation which was suggested to be accepted was that a Commonwealth law was bad if it discriminated against States in the sense that it imposed some special burden or disability upon them so that it might be described as a law aimed at their restriction or control.

995. In the Australian case Barwic, C. J., stated that the basic principles of contruction of the Australian Constitution were definitely enunciated in The *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd*[87] which unequivocally rejected the doctrine that there was an implied prohibition in the Constitution against the exercise in relation to a state of a legislative power of the Commonwealth in accordance with the ordinary rules of Constitution.

996. Mr. Palkhivala relied on some Irish cases in support of theory of implied and inherent limitations.

997. In *Ryan's case*[88] the validity of amendment of Article 50 of the Irish Constitution which came into existence in 1922 fell for consideration. Article 50 provided that within 8 years from the commencement of the Constitution amendments to the Constitution were to be made by ordinary legislation. After the expiry of 8 years amendments were to be made by referendum. The other provision in Article 50 was that amendment "shall be subject to the provisions of Article 47" of the Constitution. Article 47 made provisions for the suspension in certain events of any Bill for a period of 90 days and for the submission of any bill so suspended to referendum if demand should be made. By an Amendment Act in 1928 reference to the provisions of Article 47 was repealed. In 1929 before the expiry of 8 years there was an amendment of the Constitution whereby the period of 8 years was changed to 16 years. Both the amendments were upheld. Amendments were challenged on two grounds: first, that many Articles of the Constitution are so fundamental as to be incapable of alteration. Second, Article 50 does not authorise any change in these fundamental Articles.

---

[87] 1920 28 C L R 122.

[88] 1935 Irish Report 170.

998. The decision of the Judicial Committee in *Moore & Others* v. *Attorney-General for the Irish Free State & Others.*[89] throws a flood of light on the question of amendment of the amending power in a written Constitution. The Treaty and the Constituent Act scheduled to the Irish Free Constitution Act, 1922 being parts of an Imperial Act formed parts of the statute law of the United Kingdom. The first clause of the Treaty provided that Ireland shall have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa with a Parliament having force to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament and shall be styled and known as the Irish Free State. The second clause of the Treaty provided that the law practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Of the Articles of the Constitution, Article 12 created a legislature known as the Oireachtas and the sole and exclusive power of making laws for the peace, order and good government of the Irish Free State was vested in the Oireachtas.

999. Article 50 provided that amendments of the Constitution within the terms of the Scheduled Treaty might be made by the Oireachtas. Article 66 provided that the Supreme Court of the Irish Free State would have appellate jurisdiction from all decisions of the High Court and the decision of the Supreme Court would be final and conclusive. The proviso to that Article stated that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council. The proviso to Article 66 was inserted to give effect to Article 2 of the Treaty and hence under Article 50 of the Constitution it was argued that the proviso to Article 66 could not be amended in the way it was sought to amend it by abolishing the right of appeal. Article 50 contained another limitation that amendments within the terms of the Treaty might be made. Clause 2 of the Treaty provided that relations with the Imperial Parliament should be the same as the Canadian. By amendment act No. 6 of 1933 the words "within the terms of the Treaty" were deleted from Article 50. Thereafter Amendment Act No. 22 of 1933 was passed abrogating right of appeal to the Privy Council.

---

[89] 1935 A C 484.

1000. The Judicial Committee in *Moore's case* (supra) noticed that "Mr. Wilfrid Greene for the petitioner rightly conceded that Amendment Act No. 16 of 1929 which substituted for the 8 years specified in Article 50 as the period during which amendment might be made without a referendum a period of 16 years was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

1001. It was argued by Mr. Greene in that case that the Constituent Assembly having accomplished its work went out of existence leaving no successor and nobody in authority capable of amending the Constituent Act. The argument was in effect that the Constitution was a semi-rigid Constitution that is one capable of being amended in detail in the different Articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new constituent assembly by the people of Ireland. The decision of the Supreme Court of Ireland in *Ryan's case* (supra) was referred to by the Judicial Committee. The Judicial Committee held that the Oireachtas had power to repeal or amend the Constituent Act and in repealing or amending of parts of an Imperial Statute, namely, the Irish Free State Constitution Act, 1922 what the Oireachtas did must be deemed to have been done in the way in which alone it could legally be done, that is by virtue of the powers given by the statute. The abolition of appeals to Privy Council was a valid amendment.

1002. The decision in *Lyanage* v. *Queen*[90] was also relied on by Mr. Palkhivala for the theory of implied and inherent limitations. The Criminal Law Amendment Act passed by Parliament of Ceylon in 1962 contained substantial modifications of the Criminal Procedure Code. There was *ex post facto* legislation of detention for 60 days of any person suspected of having committed an offence against the state by widening the class of offences for which trial without jury by three judges nominated by the Minister of Justice would be ordered. An arrest without warrant for waging war against the Queen became permissible and new minimum penalties for that offence were prescribed and for conspiring to wage war against the Queen and overawe the Government by Criminal force, and by widening the scope of that offence. The Act also provided for the admission in evidence of certain confessions and statements to the police inadmissible under the Evidence Code. The Act was expressed to be retrospective to cover an abortive Coup D'etat on January 27, 1962, in which Liyanage and others took part, and was to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about the date of the commencement of the Act, whichever was later. The second Criminal Law Amendment Act of 1962 (No. 31 of 1962) substituted the Chief Justice for the Minister of Justice as the person to nominate the three Judges but left unaffected other provisions for the former Act.

1003. The Supreme Court of Ceylon convicted the appellants and sentenced them to 10 years rigorous imprisonment the minimum prescribed by the Criminal Law Act 1 of 1962.

1004. The Privy Council held the legislation to be ultra vires on two grounds. The Acts could not be challenged on the ground that they were contrary to fundamental principles of Justice. The Colonial Laws Validity Act, 1865 which provided that colonial laws should be void to the extent of repugnancy to an Act of the United Kingdom, and should not be void on the ground of repugnancy to the law of England did not leave in existence a fetter or repugnancy to some vague and unspecified law of natural justice. The Ceylon Independence Act, 1947 conferred on the Ceylon Parliament full legislative powers of a sovereign independent State. The Acts were declared to be bad because they involved a usurpation and infringement by the legislature of judicial power inconsistent with the written Constitution of Ceylon. The silence of the Constitution as to the vesting of judicial power was inconsistent with any intention that it should pass to or be shared by the executive or the Legislature. The ratio of the decision is that the legislature could not usurp judicial power. There is an observation at page 289 of the report that Section 29 (1) of the Ceylon Constitution confers power on Parliament to pass legislation which does not enable a law to usurp the judicial power of the judicature. The Judicial Committee answered the question which was posed as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority by stating that such a situation did not arise there and if any Act was passed without recourse to Section 29 (4) of the Ceylon Constitution it would be ultra vires. The Judicial Committee found that under Section 29 (4) of the Ceylon Constitution there could be an amendment only by complying with the proviso, which would be the manner and form and would not be a limitation on the width of the power. The Ceylon case is not an authority for the proposition of implied and inherent limitation on the amending power.

---

[90] (1967) 1 A C 259.

1005. In *Liyanage's case* (supra) the Privy Council rejected the contention that powers of the Ceylon Legislature should be cut down by reference to the vague and uncertain expression "fundamental principles of British Law". In deciding whether the Constitution of Ceylon provided for a separation between the legislature and the judiciary the Privy Council did not refer to consequences at all, but referred to the fact that the provisions relating to the legislature and the judicature were found in two separate parts of the Constitution. The provisions for appointment of the subordinate judiciary by a Commission consisting exclusively of Judges with a prohibition against any legislator being a member thereof and the further provision that any attempt to influence the decision was a criminal offence were held by the Judicial Committee to show that the judiciary was intended to be kept separate from the legislature and the executive. This conclusion was based on a pure construction of the provisions of the Act. The reference to consequences was in a different context. The Privy Council recognised that the impugned law dealt with a grave exceptional situation and were prepared to assume that the legislature believed that it had power to enact it.

1006. Again in *Kariappar's case*[91] the Judicial Committee considered a Ceylon Act which was inconsistent with the Ceylon Constitution. The Act imposed civic disabilities for 7 years on person to whom the Act applied and provided for the vacation of the seat as a Member of Parliament. The words amend or repeal in Section 29(4) of the Ceylon Constitution were read by the Judicial Committee to cover an amendment or repeal by inconsistent Act. The plain words amend or repeal did not admit ambiguity.

[91] 1968 AC 717.

SCC Online

1007. To introduce into our Constitution the doctrine of implied and inherent limitations on the meaning of the word "amendment" by upholding the power to amend the essential features but not the core on the theory that only people can change by referendum is to rewrite the Constitution. The decisions in *Ranasinghe's case*[92] and *Kariappar's case* (supra) are authorities for two propositions. First, that in the exercise of the power of amendment a controlled Constitution can be converted into an uncontrolled one. Second, the word "amendment" means alteration. In *Ibralebbe's case*[93] the Judicial Committee said that if the Ceylon Legislature abrogated the appeal to the Privy Council it would be an amendment of its judicial structure.

1008. The decision in *Mangal Singh* v. *Unian of India*[94] has been relied on by Mr. Palkhivala in support of the proposition that the power of amendment is subject to implied limitation. Article 4 of the Constitution which was interpreted in *Mangal Singh's case* (supra) has to be read with Articles 2 and 3. Article 4 contains a limited power of amendment, limited to amend Schedules 1 and 4 as may be necessary to give effect to a law mentioned in Articles 2 and 3 and of making supplemental, incidental and consequential provisions. Shah, J., in *Mangal Singh's case* (supra) said that power with which Parliament is invested by Articles 2 and 3 is a power to admit, establish or form new States or to admit, establish or admit new States which conform to the democratic pattern envisaged by the Constitution and is not a power to override the constitutional scheme. It is manifest that when a new State is created in accordance with Articles 2 and 3 the amendment under Article 4 will be followed up as necessary to give effect to the same. Such an amendment does not override the constitutional scheme. It is an amending power of a limited nature and is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution. This decision does not say that there are impled limitations to the amending power.

1009. The petitioner challenges the legality and the validity of the Constitution (25th) Amendment Act.

1010. The Constitution (25th) Amendment Act has first amended Article 31(2), second added Articles 31(2), 31(2-B) and third introduced Article 31-C. Article 31(2) is amended in two respects. First, it substituted the word "amount" for the word "compensation" for property acquired or requisitioned. Second, it is provided that the acquisition or requisition law shall not be called in question on the ground that whole or any part of the amount is to be given otherwise than in cash. Article 31(2-B) has been inserted to the effect that nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).

1011. Article 31-C states that notwithstanding anything contained in Article 13 no law giving effect to the policy of the state towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19 or Article 31 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. It is provided that where such law is made by the legislature of a State the provisions of this Article shall not apply thereto unless such law having been reserved for the consideration of the President has received his assent.

---

[92] 1965 AC 172.

[93] 1964 AC 900.

[94] (1967) 2 SCR 109: AIR 1967 SC 944: (1968) 1 SCJ 240.

1012. The basic controversy is really regarding the right to property and the acquisition of property by the State. The Constitution of India was intended to achieve political liberty on the one hand and economic and social liberty on the other for all citizens of India. The Directive Principles in the Constitution are also fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. That is Article 37. It can be achieved by making changes in the economic and social structure of the society.

1013. The resolutions of the Congress in 1929, 1931, 1945 and the objective resolution of January 22, 1947 and the resolution of All-India Congress Working Committee in 1947 are not only a remembrance of things past. In 1929 the Congress resolution was that it was essential to make revolutionary changes in the economic and social structure of the society and to remove the gross inequalities. It was also resolved that political freedom must include the economic freedom of the starving millions. In such economic and social programme the State is to own or control the key industries and services, mineral resources, railways, waterways, shipping and other means of public transport. In 1945 the Working Committee said that the concentration of wealth and power in the hands of individuals and groups was to be prevented. Social control of the mineral resources and of the principal methods of production and distribution in land, industry and in other departments of national activity would be necessary to develop the country into co-operative commonwealth. In the case of industries which in their nature must be run on a large scale and on centralized basis, it was felt that they should belong to the community and they should be so organised that the workers become not only co-sharers in the profits but also increasingly associated with the management and administration of the industry. Land and all other means of production as well as distribution and exchange must belong to and be regulated by the community in its own interest. The framers of the Constitution wanted a social structure which would avoid the acquisitive economy of private capitalism and the regimentation of a totalitarian State.

1014. In this background the Constitution was created with the object of effecting social revolution. The core of the commitment to the social revolution lies in Part III and Part IV of the Constitution. They are described to be "conscience of the Constitution". The object of Part III was to "liberate the power of man equally for distribution to the common good". The State would have to bear the responsibility for the welfare of citizens. The Directive Principles are a declaration of economic independence so that our countrymen would have economic as well as political control of the country.

1015. The centre of the fundamental rights is said by Mr. Palkhivala to be Articles 14, 19 and 31. It is right to property. But the Directive Principles are also fundamental. They can be effective if they are to prevail over fundamental rights of a few in order to subserve the common good and not to allow economic system to result to the common detriment. It is the duty of the State to promote common good. If the motives for co-operating with others consist in the mere desire to promote their private good they would be treating their fellowmen as means only and not also an end. The notion of common good was needed to explain away the difference between the principles of reasonable self love and benevolence. The distribution of material resources is to subserve the common good. The ownership and control of the material resources is to subserve common good. The economic system is to work in such a manner that there is no concentration of wealth to the common detriment. Again, the economic system is to work in such a manner that the means of production are not used to the common detriment.

1016. The declaration of human rights on which Mr. Palkhivala relied for the unamendability of fundamental rights is rightly said by the Attorney-General to be no impediment to the power of amendment nor to support the petitioner's contention regarding the inviolability of the right to property. For the purpose of promoting the general welfare in a democratic State the Directive Principles were said by the Attorney-General to be fundamental in achieving rights of men and economic and social rights for human dignity. Every citizen asserts enjoyment of fundamental rights under the Constitution. It becomes the corresponding duty of every citizen to give effect to fundamental rights of all citizens, dignity of all citizens, by allowing the State to achieve the Directive Principles. The duty of the State is not limited to the protection of individual interest but extends to acts for the achievement of the general welfare in all cases where it can safely act and the only limitations on the governmental actions are dictated by the experience of the needs of time. A fundamental right may be regarded as fundamental by one generation. It may be considered to be inconvenient limitation upon legislative power by another generation. Popular sovereignty means that the interest which prevails must be the interest of the mass of men. If rights are built upon property those who have no property will have no rights. That is why the State has to balance interest of the individual with the interest of the society. Industrial democracy is the necessary complement to political democracy. The State has to serve its members by organising an avenue of consumption. This can be done by socialisation of those elements in the common welfare which are integral to the well being of the community.

1017. The petitioner's challenge to the amendment on Article 31(2) is as follows. The right to property is one of the essential features of the Constitution. It is the handmaid to various other fundamental rights. The right to freedom of the Press under Article 19(1)(*a*) is meaningless if the publisher could be deprived of his printing plant and the building in which it is housed without compensation. The fundamental right under Article 19(1)(*c*) to form trade unions will be denuded of its true content if the property of a trade union could be acquired by the State without compensation. The right to practise any profession or carry on any occupation, trade or business under Article 19(1)(*g*) will be the right to do forced labour for the State if the net savings from the fruits of a citizen's personal exertion are liable to be acquired by the State without compensation. The freedom of religion in Article 26 will lose a great deal of its efficacy if the institutions maintained by a community for its religious and charitable purposes could be acquired without compensation. The implication of the proviso to Article 31(2) is that the State may fix such an amount for acquisition of the property as may abridge or abrogate any of the other fundamental rights. Exercise of fundamental rights would be affected by the deprivation of property without compensation in the legal sense and the only exception to this power of the State is the case of educational institution dealt with in the proviso. Article 31(2) as a result of the Constitution (25th) Amendment Act will empower the State to fix an amount on a basis which need not be disclosed even to the members of the Legislature and which may have no relation to the property sought to be acquired. The amount is not to satisfy any of the principles of compensation. It need not be paid in cash and it will yet not be considered to be a ground of challenge to the validity of law. Article 31(2) has nothing to do with estates, zamindaries, land reforms or agrarian reforms which are specifically dealt with by Article 31-A.

1018. The right to acquire, hold and dispose of property under Article 19(1)(*f*) is subject under Article 19(5) to reasonable restrictions in the interests of the general public. If Article 19(5) permits such reasonable restrictions it is said by the petitioner that the only object of making Article 19(1) (*f*) inapplicable by Article 31(2-B) is to enable acquisition and requisition laws to contain restrictions or provisions which are unreasonable and not in the public interest. Reliance was placed by Mr. Palkhivala on the *Bank Nationalisation case*[95] and the observations at p. 577 that if Article 19(1)(*f*) applied to acquisition or requisition, law which permitted a property to be taken without the owner being heard where the rules of natural justice would require the owner to be heard, would be void as offending Article 19(1)(*f*). Extracting that observation it is said that the amount fixed without giving him a hearing or amending the Land Acquisition Act to provide that any man's land or house can be acquired without notice to the owner to show cause or to prove what amount should be fairly paid to him for the property acquired will damage the essence or core of fundamental right to property.

1019. After the substitution of the neutral expression "amount" for "compensation" in Article 31(2) by the Constitution (25th) Amendment Act the Article still binds the legislature to provide for the giving to the owner a sum of money either in cash or otherwise. The Legislature may either lay down principles for the determination of the amount or may itself fix the amount. Before the amendment the interpretation of Article 13(2) was that the law was bound to provide for the payment of compensation in the sense of equivalent in value of the property acquired. This was the interpretation given in the *Bank Nationalisation case* (supra) even after the Constitution 4th Amendment Act, which said that the adequacy of compensation could not be challenged. The Constitution 25th Amendment Act states that the law no longer need provide for the giving of equivalent in value of the acquired property. The quantum of the amount if directly fixed by the law and the principles for its quantification are matters for legislative judgment. Specification of principles means laying down general guiding rules applicable to all persons of transactions covered thereby. In fixing the amount the Legislature will act on the general nature of the legislative power. The principle may be specified. The principle which may be acted upon by the Legislature fixing the amount may include considerations of social justice as against the equivalent in value of the property acquired. Considerations of social justice will include the relevant Directive Principles particularly in Article 39(*b*) and (*c*). These principles are to subserve the common good and to prevent common detriment. The question of adequacy has been excluded from Article 31(2) by the Constitution Fourth Amendment Act. It cannot be said that the Legislature would be under the necessity of providing a standard to measure an adequacy with reference to fixing the amount. The Constitution does not allow judicial review of a law on the ground of adequacy of the amount and the manner as to how such amount is to be given otherwise than in cash.

---

[95] (1970) 3 SCR 530: (1970) 1 SCC 248.

1020. If the word "compensation" as it stood prior to the amendment of Article 31(2) must mean equivalent value in cash it is said by the Solicitor-General that the concentration of wealth will remain unchanged and justice social, economic, and political amplified in Articles 39, 41, 42, 43, 45, 46 and 47 will be thwarted. The fulfilment of the Directive Principles is in a sense more fundamental than the mere right to property. Readjustment in the social order may not be practicable in a smooth manner unless the Directive Principles are effectively implemented. The emergence of a new social order is a challenge to present-day civilisation. If nations wanted independence and supremacy in the latter half of the 19th century and the first half of the 20th century individual dignity, individual freedom, individual status in a well organised and well planned society are opening the frontiers since the mid-century. In this background the 25th Amendment protects the law in one respect, namely, that amount payable to the owner is no longer to be measured by the standard of equivalent in value of the acquired property. The quantum cannot be a matter for judicial review. Ever since the Fourth Amendment the adequacy of compensation is excluded by the Constitution. The reason is that the Constitution declares in clear terms that adequacy is not justiciable and, therefore, it cannot be made justiciable in an indirect manner by holding that the same subject-matter which is expressly barred is contained implicitly in some other provision and is, therefore, open to examination.

1021. Just as principles which were irrelevant to compensation were invalid prior to the Constitution 25th Amendment it was said that if any principles are adopted which are irrelevant to the concept of amount as a legal concept or as having a norm the law would be invalid because the amount would be purely at the will or at the discretion of the State. Therefore, it was said that when the law fixes the amount it might indicate the principles on which the amount had been arrived at or the Court might enquire into on which the amount had been fixed. Any contrary view according to the petitioner would mean that under Article 31(2) state would have authority to specify principles which could be arbitrary or specify the amount which could be arbitrary.

1022. It was also said that as a result of the proviso to Article 31(2) after the 25th Amendment the law providing for compulsory acquisition of property of an educational institution established by a minority referred to in Article 31(1) the State was to ensure that the amount fixed or determined was such as would not restrict or abrogate the right guaranteed under that clause. The amount would have to be higher than the amount which would be sufficient not to damage the essence of that right. But under Article 31(2) after the 25th Amendment where the proviso did not apply it was said that the core of essence of the fundamental rights would be damaged or destroyed.

1023. The word "amount" in Article 31(2) after the 25th Amendment is to be read in the entire collocation of words. No law shall be called in question in any Court on the ground that the amount so fixed or determined is inadequate or the whole or part of it or any part of such amount is given in cash. In Article 31(2) the use of the word "amount" in conjunction with payment in cash shows that a sum of money is being spoken of. Amount is a sum meaning a quantity or amount of money, or, in other words, amount means a sum of money.

1024. Article 31(2) prior to as well as after the 25th Amendment indicates two alternatives to the legislatures either to specify the principles for determination of the amount or to fix the amount of "compensation" prior to the amendment. In fixing the amount or compensation the Legislature is not required to set out in the law the principles on which compensation had been fixed in the unamended clause or the amount is fixed in the amended clause.

1025. Article 19(1)(*f*) provides that all citizens shall have the right to hold, acquire or dispose of property whereas Article 31(2) deals with law by which the property is acquired. Such law acquiring propertly directly extinguishes the right to hold or dispose of property acquired. Article 19(1)(*f*) is excluded from Article 31(2) in order to make Article 31(2) self contained. The right to hold property cannot co-exist with the right of the State to acquire property. That is why Article 31(2) is to be read with Articles 31-A, 31-B and 31-C, all the Articles being under the heading "Right to Property."

1026. It has been held by this Court in *F. N. Rana* v. *State of Gujarat*[96] that Land Acquisition Act does not give the right of quasi-judicial procedure or the requirements of natural justice as Section 5-A of that Act has been held to be administrative. It has also been held by this Court that a Requisition Act which did not give a right of representation before an order for requisition was made did not violate Article 19(1)(*f*). See *S. M. Nandi* v. *State of West Bengal*.[97]

1027. The other part of the 25th Amendment which is challenged by the petitioner is Article 31-C. Article 31-C is said by Mr. Palkhivala to destroy several essential features of the Constitution for these reasons. First, there is a distinction between cases where the fundamental rights are amended and laws which would have been void before the 25th Amendment are permitted to be validly passed and cases where the fundamental rights remain unamended but the laws which are void as offending those rights are validated by a legal fiction that they shall not be deemed to be void. The law is in the first case constitutional in reality whereas in the second case the law is unconstitutional in reality but is deemed by a fiction of law not to be void with the result that laws which violate the Constitution are validated and there is a repudiation of the Constitution. If Article 31-C is valid it would be permissible to Parliament to amend the Constitution so as to declare all laws to be valid which are passed by Parliament or State legislatures in excess of legislative competence or which violate basic human rights enshrined in Part III or the freedom of inter-State Trade in Article 301. Article 31-C gives a blank charter to Parliament and the State legislatures to defy the Constitution or damage or destroy the supermacy of the Constitution. Secondly, Article 31-C subordinates fundamental rights to Directive Principles. The right to enforce fundamental rights is guaranteed under Article 32. The Directive Principles are not enforceable by reason of Article 37. Yet it is said that while giving effect to Directive Principles fundamental rights are abrogated. Thirdly, whereas an amendment of a single fundamental right would require a majority of at least two-thirds of the members of Parliament present and voting, a law within Article 31-C which overrides and violates several fundamental rights can be passed by a simple majority. Fourthly, every fundamental right is an essential feature of the Constitution and Article 31C purports to take away a large number of those fundamental rights. Fifthly, the Court is precluded from considering whether a law under Article 31-C is such that it can possibly secure Directive Principles in question. Sixthly, no State legislature can amend the fundamental rights or any other part of the Constitution but Article 31-C empowers the State legislature to pass laws which virtually involve repeal of the fundamental rights. Power of amending the Constitution is delegated to State legislatures.

---

[96] (1964) 5 SCR 294 : AIR 1964 SC 648.

[97] (1971) 1 SCC 688 : AIR 1971 SC 961.

1028. Finally, it is said that the fundamental rights, under Articles 14, 19 and 31 which are sought to be superseded by Article 31-C are necessary to make meaningful specific rights of the minorities which are guaranteed by Articles 25 to 30. The proviso to Article 31(2) shows that in the case of acquisition of property of an educational institution established by a minority an amount fixed should be such as not to restrict or abrogate the right of the minorities under Article 31. It is, therefore, said that the implication is that if property is acquired in cases other than those of minorities an amount can be fixed which restricts or abrogates any of the fundamental rights. Again, it is said that if a law violates the right of the minority under Articles 25 to 30 such a law would be no law. Therefore, deprivation of property under such law would violate Article 31(1). But the 25th Amendment by Article 31-C abrogates Article 31(1) and minorities can be deprived of their properties held privately or upon public, charitable or religious trusts by law which violates Articles 25 to 30.

1029. The pre-eminent feature of Article 31-C is that it protects only law. Therefore, any question of violation of Article 31(1) does not arise. Law referred to in Article 31-C must be made either by Parliament or by the State legislature, according to the legislative procedure for enacting a law. There are several articles in the Constitution where the expression "law" with reference to the authority to make law has been used. These are Articles 17, 19(2) to (6), 21, 22, 23(1), 26, 31, 33, 34 and 35. These Articles indicate that the expression "law" there means law made by the legislature in accordance with its ordinary legislative procedure. The expression "law" does not include within itself ordinance, order, bye-law; rule, regulation, notification, custom or usage having the force of law nor an amendment of the Constitution in accordance with the procedure prescribed in Article 368. In Article 13 the term "law" has been used in a wide sense. For this a definition was given in Article 13(3) to include certain other categories. The definition in Article 13(3) is expressly limited for Article 13. Law in Article 31-C must have the same meaning as it has in other Articles generally, namely a statute passed by the legislature.

1030. It is true that such law may need details to be filled up by other agencies but the essential elements of Article 31-C must be supplied directly by the enactment. A question arose with reference to Article 254 as to whether a clause of the Sugar Control Order, 1955 made under the Essential Commodities Act had the effect of repealing the corresponding Uttar Pradesh State Law. This Court held that the power of repeal was vested in Parliament and Parliament alone could exercise it by enacting an appropriate provision in that regard. Parliament could not delegate the power of repeal to any executive authority. See *Ch. Tika Ramji & Others. etc.* v. *The State of Uttar Pradesh and Others.*[98]

1031. Article 31-C is inextricably bound up with Article 39(*b*) and (*c*) because the purpose and the phraseology in both the Articles are essentially identical. The legislative efforts to implement Directive Principles in Article 39(*b*) and (*c*) were set in motion in some States to achieve reforms in

[98] 1956 SCR 393: AIR 1956 SC 676: 1956 SCJ 625.

land law. Articles 31-A and 31-B were introduced by the Constitution First Amendment Act 1951. The main reason for introducing Articles 31-A and 31-B was to exclude the operation of Part III as a whole from those provisions. The true relationship between Directive Principles in Part IV and the fundamental rights in Part III became clear. It was realised that though the liberty of individual was valuable it should not operate as an insurmountable barrier against the achievement of Directive Principles. In *Sajjan Singh's case*[99] it was said that "the rights of society are made paramount and they are placed above those of the individual". In the *Bihar Land Reforms case*[1] it was said that "a fresh outlook which placed the general interest of the community above the interest of the individuals, pervades over Constitution".

1032. Law contemplated in Article 31-C will operate on the ownership and control of the material resources of the community to be distributed as best to subserve the common good. The operation of the economic system should not result in concentration of wealth. Means of production should not be used to the common detriment. The ownership and control of the material resources of the community can be achieved by nationalisation and planned economy. The operation of the economic system will mean imposition of control on the production, supply and distribution of products of key industries and essential commodities. There can be laws within Schedule 7 List III, Entries No. 42, 43; List I, Entries No. 52 to 54 and List II Entries No. 23, 24, 26 and 27.

1033. The provisions in Article 31-C that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy was questioned by the petitioner to exclude judicial review and, therefore, to be illegal. Article 31-C was in the second place said to enable the State legislatures to make discriminatory laws destructive of the integrity of India. Thirdly, Article 31-C was said to delegate the amending power to State legislatures or Parliament in its ordinary legislative capacity.

1034. The declaration mentioned in Article 31-C is for giving effect to the policy of the State towards securing the principles in Article 39(*b*) or (*c*). Such a declaration in a law shall not be called in question on the ground that it does not give effect to such policy. The laws which receive protection under Article 31-C are laws for securing the Directive Principles of Article 39(*b*) and (*c*). The nexus or connection between the law and the objectives set out in Article 39(*b*) and (*c*) is a condition precedent for the applicability of Article 31-C. On behalf of the Union and the State it was not contended that whether there was such nexus or not was not justiciable. The real reason for making the declaration free from question in a Court of law on the ground that it does not give effect to such policy is to leave legislative policy and wisdom to the legislature. The legislative measure might not according to some views give effect to Directive Principles. Therefore, legislatures are left in charge of formulating their policy and giving effect to it through legislation. It is the assessment and judgment of such measures which is sought to be excluded from judicial review by the declaration.

1035. In order to decide whether a statute is within Article 31-C the Court may examine the nature and the character of legislation and the matter dealt with as to whether there is any nexus of the law to the principles mentioned in Article 39(*b*) and (*c*). If it appears that there is no nexus between the legislation and the objectives and principles mentioned in Article 39(*b*) and (*c*) the legislation will not be within the protective umbrella. The Court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course.

---

[99] (1965) 1 SCR 933 : AIR 1965 SC 845: (1965) 1 SCJ 377.

[1] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 354.

1036. The reason for excepting Articles 14, 19 and 31 from Article 31-C is the same as in Article 31-A. The Solicitor-General rightly said that the fear of discrimination is allayed by three safeguards. The first and the foremost safeguard is the good sense of the Legislature and the innate good sense of the community. The second safeguard is the President's assent. The third safeguard is that in appropriate cases it can be found as to whether there is any nexus between law and Directive Principles sought to be achieved. There is no better safeguard than the character of the citizen, the character of the legislature, the faith of the people in the representatives and the responsibility of the representatives to the nation. No sense of irresponsibility can be ascribed or attributed to the representatives of the people. The exclusion of Article 14 is to evolve new principles of equality in the light of Directive Principles. The exclusion of Article 19 is on the footing that laws which are to give effect to Directive Principles will constitute reasonable restrictions on the individual's liberty. The exclusion of Article 31(2) is to introduce the consideration of social justice in the matter of acquisition. Directive Principles are not limited to agrarian reforms. Directive Principles are necessary for the uplift and growth of industry in the country.

1037. Article 31(4) and 31(6) speak of certain class of laws not being called in question on the ground of contravention of Article 31(2). Article 31-A relates to law of the class mentioned therein not to be void on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Articles 14, 19 and 31. Article 15(4) states that nothing in Article 15 or in Article 29(2) shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 31(5)(*b*)(*ii*) states that nothing in Article 31(2) shall affect the provisions of any law which the State may make for the promotion of public health. Article 33 speaks of law with regard to members of the Armed Forces charged with the maintenance of public order, so as to ensure the proper discharge of their duties and the maintenance of discipline among them and for that purpose the operation of some fundamental right in Part III is modified.

1038. The Solicitor-General rightly said that similarly Article 31-C creates a legislative field with reference to the object of legislation. It is similar to laws contemplated in Article 15(4), Article 31(5)(*b*)(*ii*) and Article 33. Each of these Articles carves out an exception to some Article or Articles conferring fundamental rights. The fields carved out by the various Articles are of different dimensions. The entire process of exception of the legislative field from the operation of some of the Articles relating to fundamental rights is the mandate of the Constitution. It is wrong to say that the Constitution delegates power of amendment to Parliament or the States. As a result of the 25th Amendment the existing legislative field is freed from the fetters of some provisions of Part III of our Constitution on the legislative power.

1039. Article 31-C substantially operates in the same manner in the industrial sphere as Article 31-A operates in the agrarian sphere. The problems are similar in nature though of different magnitude. The constitutional method adopted to solve the problem is similar. The Solicitor-General is correct in summing up Article 31-C as an application of the principles underlying Article 31 (4) and 31(6) and Article 31-A to the sphere of industry.

1040. A class of legislation can be identified and the legislative field can be carved out from the operation of fundamental rights or some of those can be excluded by a provision of the Constitution. Article 31 (4) and 31 (6) identify the laws with reference to the period during which they were made. Article 31(4) relates to a bill pending at the commencement of the Constitution in the Legislature of a State to have been passed by such legislature and to have received the assent of the President to be not called in question on the ground that it contravenes Article 31(2). Article 31(6) relates to law of the State enacted not more than 19 months from the commencement of the Constitution to be submitted to the President for his certification and upon certification by the President not to be called in question on the ground of contravention of Article 31(2). Article 31(2) and 31-A identify the legislative field with reference to the subject-matter of law. Articles 15(4) and 33 and Article 31(5)(*b*)(*ii*) identify laws with reference to the objective of the Legislature. The exceptions to some part or some Articles of Part III of the Constitution is created by the Constitution and any law which is made pursuant to such power conferred by the Constitution does not amend the operation or application of these Articles in Part III of the Constitution. The crux of the matter is that modification or exception regarding the application of some of the Articles in Part III is achieved by the mandate of the Constitution and not by the law which is to be made by Parliament or State under Article 31-C. Therefore, there is no delegation of amending powers. There is no amendment of any constitutional provision by such law.

1041. The Constitution First Amendment Act, 1951 introduced Articles 31-A and 31-B and Schedule 9 which are to be read together. Article 31-A excluded a challenge under the whole of Part III for the laws of the kind mentioned in that Article. Article 31-B retrospectively validated laws mentioned in Schedule 9 from challenge under Part III and also on the ground that they violated Section 299 of the Government of India Act, 1935. It may be stated here that Parliament which passed the Constitution First Amendment Act, 1951 was the Constituent Assembly functioning as a legislature, till elections were held and a Parliament as provided for under the Constitution could be formed. Articles 31-A and 31-B carried out the intention of the framers of the Constitution as stated in Article 31 (4) and 31(6) that land legislation or agrarian reform was to be reinforced and fundamental rights were not to be allowed to stand in the way of implementing the Directive Principles of State policy contained in Article 39. The fundamental right conferred under Article 31 (2) was subordinated to Article 39 (*b*) and (*c*) in order to protect laws referred to in Article 31 (4) and 31 (6). When that object failed and the law was struck down under Article 14, Parliament gave effect to the policy underlying Article 31 (4) and 31 (6) by excluding a challenge under every Article in Part III. In the *Bihar Land Reforms case* (supra) this Court said that the purpose behind the Bihar Land Reforms Act was to bring about a reform of the land distribution system in Bihar for the general benefit of the community and the Legislature was the best judge of what was good for the community and it was not possible for this Court to say that there was no public purpose behind the acquisition contemplated in the statute.

1042. This Court in *State of West Bengal* v. *Bela Banerjee*[2] held that the word "compensation" means just equivalent or full indemnity for the property expropriated. In *Dwarkadas Shrinivas* v. *Sholapur Spg. & Wvg. Co. Ltd.*[3] this Court struck down the law for taking over the management of Sholapur Mills on the ground that it amounted to acquisition and since no compensation was provided for, the law was held to be void. The Constitution Fourth Amendment Act, 1955 came to remedy the implementation of essential welfare legislation. One of the measures in the Fourth Amendment Act was the amendment of Article 31 by making adequacy of compensation non-justiciable and the other was to amend Article 31-A. The formula which had been used in Article 31 (4) and 31(6) to exclude the contravention of Article 31(2) was adopted with regard to adequacy of compensation. As a result of the amendment of Article 31-A new categories were added to the Article and new Acts were added to the Ninth Schedule. The 17th Amendment Act made changes in Article 31-A (1) and the proviso and amended Schedule 9 by inserting new Acts therein.

1043. The successive amendments of the Constitution merely carried out the principle embodied in Article 31, clauses (4) and (6) that legislation designed to secure that public good and to implement the Directives under Article 39 (*b*) and (*c*) should have priority over individual rights and that therefore fundamental rights were to be subordinate to Directives or State Policy.

1044. Article 31 (2) as it originally stood spoke of compensation for acquisition or requisition of property. The meaning given to compensation by the Court was full market value. There was no scope for giving effect to the word "compensation". There was no flexibility of social interest in Article 31 (2). Every concept of social interest became irrelevant by the scope of Article 13 (2). It is this mischief which was sought to be remedied by the 25th Amendment. If Directive Principles are to inter-play with Part III legislation will have to give expression to such law. Parts III and IV of the Constitution touch each other and modify. They are not parallel to each other. Different legislation will bring in different social Principles. These will not be permissible without social content operating in a flexible manner. That is why in the 25th Amendment Article 31(2) is amended to eliminate the concept of market value for property which is acquired or requisitioned.

1045. If compensation means an amount determined on principles of social justice there will be general harmony between Part III and Part IV. Secondly, if compensation means market price then the concept of property right in Part III is an absolute right to own and possess property or to receive full price, while the concept of property right in Part IV is conditioned by social interest and social justice. There would be an inherent conflict in working out the Directive Principles of Part IV with the guarantee in Part III. That is why clauses (4) and (6) of Article 31 illustrate the vital principle that to make effective a legislative effort to bring about changes in accordance with Directive Principles particularly those contained in Article 39 (*b*) and (*c*) Article 31 (2) may have to be abridged. The social interest and justice may vary from time to time and territory to territory and individual rights may have to be limited.

---

[2] 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.

[3] 1954 SCR 674: AIR 1954 SC 119: 1954 SCJ 175.

1046. Just as the amount can be fixed on principles of social justice the principles for determining the amount can be specified on the same consideration of social justice. Amount is fixed or the principles are specified by the norm of social justice in accordance with Directive Principles.

1047. In amending Article 31(2) under the 25th Amendment by substituting the word "amount" for "compensation" the amount fixed is made non-justiciable and the jurisdiction of the Court is excluded because no reasons for fixing such amount would or need appear in the legislation. If any person aggrieved by the amount fixed challenges the Court can neither go into the question of adequacy nor as to how the amount is fixed. If adequacy cannot be qestioned any attempt to find out as to why the particular amount is fixed or how that amount has been fixed by law will be examining the adequacy which is forbidden as the constitutional mandate. If one alleges that the amount is illusory one will meet the insurmountable constitutional prohibition that the adequacy or the alleged arbitrariness of the amount fixed is not within the area of challenge in courts.

1048. The amount fixed is not justiciable. The adequacy cannot be questioned. The correctness of the amount cannot be challenged. The principles specified are not justiciable.

1049. If on the other hand, the Legislature does not fix the amount but specifies the principles for determining the amount, the contention that principles for determining the amount must not be irrelevant loses all force because the result determining the amount by applying the specified principles cannot be challenged on the ground of inadequacy. If principles are specified for determining the amount and as a result of the application of the principles the result is less than the market value it will result in the same question of challenging adequacy.

1050. The relevancy of the principles cannot be impugned. Nor can the reasonableness of the principles be impeached.

1051. Article 14 has the flexibility of classification. Article 19 has the flexibility of reasonable restrictions. Social justice will determine the nature of the individual right and also the restriction on such right. Social justice will require modification or restriction of rights under Part III. The scheme of the Constitution generally discloses that the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary individual rights have been subordinated or cut down to given effect to the principles of social justice. Social justice means various concepts which are evolved in the Directive Principles of the State.

1052. The 25th Amendment has amended Article 31(2) and also introduced Article 31 (2-B) in order to achieve two objects. The first is to eliminate the concept of market value in the amount fixed for acquisition or requisition of the property. The second is to exclude in clause (2-B) of Article 31 the applicability of Article 19(1)(*f*). Articles 31-A and 31-B applied to acquisition and requisition of property The purpose of Article 31-C is to confer by constitutional mandate power on Parliament and State to make laws for giving effect to Directive Principles. The significance of the total exclusion of Part III from Articles 31-A and 31-B is that it brings about in unmistakable manner the true relationship between the provisions of Part IV and Part III of the Constitution.

1053. With reference to land legislation subordination of fundamental rights of individuals to the common good was clear in clauses (4) and (6) of Article 31. It was made clearer by the Constitution First Amendment Act which introduced Articles 31-A, 31-B and Schedule 9. Articles 31-A, 31-B Schedule 9 and Article 31-C merely removed the restrictions which Part III of the Constitution imposes on legislative power. Article 31-A after the Fourth Amendment removed the restrictions on legislative power imposed by Articles 14, 19 and 31. In enacting Clauses (*b*), (*c*) and (*d*) in Article 31-A Parliament was giving effect to social control which though less urgent than land reform became in course of time no less vital. Article 31-B by the First Amendment retrospectively validated the laws specified in Schedule 9 by retrospectively removing all invalidity from the law because of the transgression of rights in Part III. Again, the seven new Acts added in the Ninth Schedule by the Fourth Amendment Act had nothing to do with agrarian reform, but dealt with subjects of great national importance. The Constitution Fourth Amendment Act was intended to remove the barriers of Articles 14, 19 and 31(2) in respect of land legislation considered essential for public good.

1054. State legislatures cannot remove the fetter. They have no power to amend the Constitution. Parliament cannot remove the fetter by ordinary law. By amendment of the Constitution Parliament can remove the fetter by either deleting one or more fundamental right or rights or by excluding certain laws or certain kinds of law from the fetter.

1055. The pattern of Articles 31-A, 31-B, the Ninth Schedule and Article 31-C is best understood by the observations of Patanjali Sastri, C.J., In *Sankari Prasad's case*(supra) and of Wanchoo, J., in *Golak Nath case*(supra). Patanjali Sastri, C.J., said in *Sankari Prasad's case* (supra) ; "Articles 31-A and 31-B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of Article 13 read with other relevant Articles of Part III. The new Articles being thus essentially amendments of the Constitution have the power of enacting them. It was said that Parliament could not validate the law which it had no power to enact. The proposition holds good whether the validity of the impugned provision turns on whether the subject-matter falls within or without the jurisdiction of the Legislature which passed it. But to make law, which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament". Wanchoo, J. said of Article 31-B. "The Laws had already been passed by the State legislature and it was their constitutional infirmity, if any, which was being cured by the device adopted in Article 31-B read with the Ninth Schedule......................Parliament alone could do it under Article 368 and there was no need for any ratification under the proviso for amendment of Part III is not entrenched in the proviso".

1056. The conclusiveness of declaration introduced by the 25th Amendment in a law under Article 31-C is to be appreciated in the entire context of Article 31-C. In removing restrictions of Part III in respect of a law under Article 31-C there is no delegation of power to any legislature. There is only removal of restriction or legislative power imposed by Articles 14, 19 and 31. Article 31-C does not confer any power to amend the Constitution. The exclusion of Article 31 is a necessary corollary to protecting the impugned law from challenge under Articles 14, 19 and 31 because Article 13(2) would but for its exclusion in Article 31-C render such laws void. The declaration clause is comparable to Section 6(3) of the Land Acquisition Act, 1894 which contains a conclusive evidence clause that declaration shall be conclusive evidence that the land is needed for a public purpose and for a company as the case may be. A conclusive declaration would not be permissible so as to defeat a fundamental right. In Article 31(5) it is provided that nothing in clause (2) shall affect (*a*) the provisions of any existing law other than a law to which the provisions of clause (6) apply and since the Land Acquisition Act, 1894 is an existing law the conclusive declaration clause prevails and is not justiciable. See *Babu Barkya Thakur* v. *The State of Bombay and Others.*[4] The same view was reiterated by this Court in *Smt. Somavanti & Others.* v. *The State of Punjab & Others.*[5] that a declaration under the Land Requisition Act was not only conclusive about the need but was also conclusive for the need was for a public purpose.

1057. Conclusive proof is defined in the Indian Evidence Act. It is, therefore, seen that the legislative power carries with it the power to provide for conclusive proof so as to oust jurisdiction of a Court. The declaration is for the purpose of excluding the process of evaluation of legislation on a consideration of the virtues and defects with a view to seeing if the law has led to the result intended. If a question arises as to whether a piece of legislation with such declaration has a nexus with the Directive Principles in Article 39(*b*) and (*c*) the Court can go into the question for the purpose of process of identification of the legislative measure on a consideration of the scope and object and pith and substance of the legislation. Therefore, the 25th Amendment is valid.

1058. A contention was advanced on behalf of the petitioner that Article 31-B applies to agrarian reforms or in the alternative Article 31-B is linked to Article 31-A and is to be read as applying to laws in respect of five subject matters mentioned in Article 31-A. The 13 Acts mentioned in the Ninth Schedule as enacted by the First Amendment Act, 1951 dealt with estates and agrarian reforms. There is nothing in Article 31-B to indicate that it is linked with the same subject-matter as Article 31-A. In the *Bihar Land Reform's case* (supra) Patanjali Sastri, C.J., said at pp. 914-915 of the report[6] that the opening words of Article 31-B are only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are not in any way calculated to restrict the application of the latter Article or of the enactments referred to therein to acquisition of estates.

1059. In *Vishweshwar Rao* v. *State of Madhya Pradesh*[7] it was urged that Article 31-B was merely illustrative of Article 31-A and as the latter was limited in its application to estates as defined therein Article 31-B was also similarly limited. That contention was rejected and it was said that Article 31-B specifically validates certain Acts mentioned in the Schedule despite the provisions of Article 31-A and is not illustrative of Article 31-A but stands independent of it.

1060. Again in *Jeejibhoy* v. *Assistant Collector*[8] it was contended that Articles 31-A and 31-B should be read togethar and if so read Article 31-B would only illustrate the cases that would otherwise fall under Article 31-B, and, therefore, the same construction as put upon Article 31-B should apply to Article 31-A. This Court did not accept the argument. It was said that

---

4. (1961) 1 SCR 128 : AIR 1960 SC 1203 : (1961) 2 SCJ 392.
5. (1963) 2 SCR 774 : AIR 1963 SC 151 : (1963) 2 SCJ 35.
6. 1952 SCR 889 : AIR 1952 SC 252 : 1952 SCJ 354.
7. 1952 SCR 1020 : AIR 1952 SC 252, 296 : 1952 SCJ 427.
8. (1965) 1 SCR 636 : AIR 1965 SC 1096

the words "without prejudice to the generality of the provisions contained in Article 31-A" indicate that the Acts and Regulations specified in the Ninth Schedule would have the same immunity even if did not attract Article 31-A of the Constitution. If every Act in the Ninth Schedule would he covered by Article 31-A, Article 31B would be redundant. Some of the Acts mentioned in the Ninth Schedule, nemely, Items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in Articicle 31-A (2) of the Constitution. It was, therefore, held in *Jeejibhoy's case* (supra) that Article 31-B was constitutional device to place the specific statute beyond any attack on the ground that they infringe Part III of the Constitution.

1061. The words "without prejudice to the generality of the provisions contained in Article 31-A" occurring in Article 31-B indicate that Article 31-B stands independent of Article 31-A. Article 31-B and the Schedule are placed beyond any attack on the ground that they infringe Part III of the Constitution. Article 31-B need not relate to any particular type of legislation. Article 31-B gives a mandate and complete protection from the challenge of fundamental rights to the Scheduled Acts and the Regulations. Article 31-A protects laws in respect of five subject-matters from the challenge of Articles 14, 19 and 31, but not retrospectively Article 31-B protects Scheduled Acts and the Regulations and none of the Scheduled Acts are deemed to be void or even to have become void on the ground of contravention of any fundamental right.

1062. The validity of the Constitution 29th Amendment Act lies within a narrow compass. Article 31-B has been held by this Court to be a valid amendment. Article 31-B has also been held by this Court to be an independent provision. Article 31-B has no connection with Article 31-A. *The Bihar Land Reform's case*, (supra) and *Jeejibhoy's case*, (supra) are well-settled authorities for that proposition. It, therefore, follows that Mr. Palkhivala's contention cannot be accepted that before the Acts can be included in the Ninth Schedule requirements of Article 31-A are to be complied with.

1063. For the foregoing reasons these are the conclusions.

1064. First, the power to amend the Constitution is located in Article 368. Second, neither the Constitution nor an amendment of the Constitution can be or is law within the meaning of Article 13. Law in Article 13 means laws enacted by the legislature subject to the provision of the Constitution. Law in Article 13(2) does not mean the Constitution. The Constitution is the supreme law. Third, an amendment of the Constitution is an exercise of the constituent power. The majority view in *Golak Nath's case*, (supra) is with respect wrong. Fourth, there are no express limitations to the power of amendment. Fifth, there are no implied and inherent limitations on the power of amendment. Neither the Preamble nor Article 13(2) is at all a limitation on the power of amendment. Sixth, the power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of this Constitution. Under Article 368 the power to amend can also be increased. The 24th Amendment is valid. The contention of Mr. Palkhivala that unlimited power of amendment would confer power to abrogate the Constitution is rightly answered by the Attorney General and Mr. Seervai that amendment does not mean mere abrogation or wholesale repeal of the Constitution. The Attorney-General and Mr. Seervai emphasised that an amendment would leave an organic mechanism providing the Constitution organisation and system for the State. If the Constitution cannot have a vital growth it needs must wither. That is why it was stressed on behalf of the respondents that orderly and peaceful changes in a constitutional manner would absorb all amendments to all provisions of the Constitution which in the end would be "an amendment of this Constitution".

1065. The 25th Amendment is valid. The adequacy of amount fixed or the principles specified cannot be the subject-matter of judicial review. The amendment of Article 31(2-B) is valid. Article 31(2) is self contained and Articles 31(2) and 19(1)(*f*) are mutually exclusive. Amendment of fundamental right prior to the amendment was and is now after the 24th Amendment valid. Article 31-C does not delegate or confer any power on the State Legislature to amend the Constitution. Article 31-C merely removes the restrictions of Part III from any legislation giving effect to Directive Principles under Article 39(*b*) and (*c*). The power of Parliament and of State legislatures to legislate on the class of legislation covered by Article 31-C is rendered immune from Articles 14, 19 and 31.

1066. The inclusion of the Kerala Act, 35 of 1969 and the Kerala Act 25 of 1971 by the 29th Amendment in the Ninth Schedule is valid. Article 31-B is independent of Article 31-A.

1067. In the result the contentions of Mr. Palkhivala fail. Each party will pay and bear its own costs. The petitions will be placed before the Constitution Bench for disposal in accordance with law.

Jaganmohan Reddy, J.—The detailed contentions addressed before us for 66 days have been set out in the judgment of My Lord the Chief Justice just pronounced, and I would only refer to such of those as are necessary for dealing with the relevant issues. Though I agree with some of the conclusions arrived at by him, but since the approach in arriving at a conclusion is as important as the conclusion itself, and particularly in matters involving vital constitutional issues having a far-reaching impact on fundamental freedoms of the people of this country and on the social objectives which the State is enjoined to achieve under the Directive Principles of State Policy, I consider it my duty to express my views in my own way for arriving at those conclusions.

1069. In this case the validity of the Constitution (Twenty-fourth) and (Twenty-fifth) Amendment Acts of 1971 and the Constitution (Twenty-ninth) Amendment Act of 1972 has been challenged as being outside the scope of the power of amendment conferred on Parliament by Article 368 of the Constitution and consequently void.

1070. The validity of the Twenty-fourth Amendment would depend upon the interpretation of two crucial articles, Article 13 and Article 368, and two words, one in each article, namely, 'law' in the former, and 'amendment' in the latter. For the purposes of ascertaining the true intent and scope of these articles in *I. C. Golaknath and others* v. *State of Punjab*,[9] the basic question which the Court first considered was, where was the power to amend the Constitution of India to be found? Subba Rao, C. J., with whom Shah and Sikri, JJ., as they then were, and Shelat and Vaidialingam, JJ., concurred, (hereinafter referred to as the leading majority judgment), held that the power was contained in Articles 245, 246 and 248, read with Entry 97 of List I of Schedule VII, and not in Article 368 which only provided for the procedure to amend the Constitution. Hidayatullah, J., as he then was, in his concurring judgment held that the procedure of amendment, if it can be called a power at all, is a legislative power, but it is *sui generis* and outside the three Lists of the Constitution, and that Article 368 outlines a process which, if followed strictly, results in the amendment of the Constitution. He was, therefore, of the view that the Article gives power to no particular person or persons. All the named authorities have to act according to the letter of the Article to achieve the result.

---

[9] (1967) 2 SCR 762 : AIR 1967 SC 1643 : (1967) 2 SCJ 486.

1071. Wanchoo, J, as he then was, for himself and two other Judges, Bachawat and Ramaswami, JJ., found the power in Article 368 itself and not in Articles 245, 246 and 248, read with Entry 97 of List I.

1072. It is, therefore, contended by the learned Advocate-General of Maharashtra, firstly that the finding in the leading majority judgment that the fundamental rights cannot be amended is based on the decision that the amending power is to be found in the residuary Article 248 read with Entry 97 of List I of Schedule VII. This finding is deprived of its foundation, since six Judges held that the amending power is not to be found in the residuary Article and Entry 97 of List I. Secondly, the conclusion that the fundamental rights cannot be amended was reached by the leading majority judgment on the basis that Article 13(2) was attracted by the opening words of Article 245 and, therefore, a law amending the Constitution under Entry 97 of List I was a law referred to in Article 245, and as it was in conflict with Article 13(2) the law was void.

1073. It is again contended that this conclusion loses its validity once its basis is destroyed by five Judges holding that the amending power is not to be found in Entry 97 of List I, but in Article 368. In view of the conclusion of Hidayatullah, J., that the power of amendment as well as procedure therefor was contained in Article 368 itself, he submits that there is no ratio binding on this Court unless it be that the power of amendment is not in the residuary article but in Article 368. This argument is of little validity, because the ratio of the decision, where a question is directly raised before the Court for decision, is that which it decides, and in that case wherever the power may have been found, whether in Article 368 or in the residuary Entry 97 of List I of Schedule VII, the controversy was whether an amendment made under Article 368 is a 'law' within the meaning of Article 13(2), and if it is so, a State cannot make a law taking away or abridging fundamental rights conferred by Part III of the Constitution. That question being answered in the affirmative by the majority, the ratio of Golaknath's decision is that an amendment under Article 368 is a 'law' within the meaning of Article 13(2). What the leading majority judgment in that case did not decide, however, is whether Article 368 itself could be amended under the proviso of that article conferring a power to amend the whole Constitution. At p. 805, Subba Rao, C.J., observed, "In the view we have taken, on the scope of Article 368 vis-a-vis the fundamental rights, it is also unnecessary to express our opinion, on the question whether the amendment of the fundamental rights is covered by the proviso to Article 368". While five Judges who were in minority held that each and every article of the Constitution could be amended in exercise of the power under, and by following the procedure in Article 368, Hidayatullah, J., held that by amending Article 368, Parliament could not do indirectly what it could not do directly, namely, amend Article 13(2) or override the provisions thereunder, because as he said, "The whole Constitution is open to amendment. Only two dozen articles are outside the reach of the Article 368. That too because the Constitution has made them fundamental". (See p. 878). There is, therefore, warrant for the submission that *Golaknaths' case* (supra) is not determinative of the question now raised before this Court as to whether the power to amend Article 368 could be exercised to amend the fundamental rights in Part III. At any rate, five of the six Judges who expressed an opinion on this aspect support the proposition that this can be done.

1074. It was also submitted that no question in fact arose for decision in *Golaknaths' case* (supra) that in future Parliament could not amend the fundamental rights, because what that case was concerned with was the past exercise of the power to amend the fundamental rights, and, therefore, the observations in the majority judgments, of Subba Rao, C. J., and Hidyatullah, J., as he then was, about the future exercise of that power are clearly obiter. It may be pointed out that the majority judgment as well as the minority judgment concurred in dismissing the petition, the former on the ground that the First, Fourth and Seventeenth Amendments were not affected either on the basis of the doctrine of prospective overruling or on the basis of acquiescence or on the ground that they were made by virtue of a valid exercise of the amending power under Article 368. On this basis it is submitted that no ratio can be found in that case for the majority declaring that Parliament in future cannot amend fundamental rights which is binding on this Court; nor can it amend the amending article to take away or abridge fundamental rights.

1075. Whether the First, Fourth and Seventeenth Amendments have been rightly held to be valid or not, the ratio of the decision as was observed earlier is that under Article 368 as it was before its amendment, Parliament could not amend the Constitution to take away or abridge any of the fundamental rights conferred by Part III of the Constitution, and that question will only assume importance if this Court comes to the conclusion, following Hidayatullah, J'.s decision, that Parliament cannot amend Article 368 under proviso (*e*) thereof to take away or abridge any of the fundamental rights or to amend Article 13(2) making it subject to an amendment under Article 368. If such a power exists, the question whether an amendment in Article 368 is a 'law' within the meaning of Article 13(2) may not prima facie be of significance. There are, however, two aspects to this problem, firstly, whether 'law' in Article 13(2) includes an amendment of the Constitution under Article 368; and secondly, if this Court holds that 'law' in Article 13(2) does not include an amendment under Article 368, then the question would be, has the Constitution (Twenty-fourth) Amendment purported to exercise a power in effecting that amendment which was not granted under that Article? In other words, are there any limitations to the amending power under Article 368? If, as was held by Hidayatullah, J., that the power of amendment conferred on Parliament under Article 368 is not a constituent power, and any amendment made thereunder is a legislative power, which is 'law' within the meaning of Article 13(2), then Parliament cannot do indirectly what it cannot do directly.

1076. The first question which would arise for decision is what does 'law' in Article 13(2) signify, and is there any internal evidence which would indicate that that word has been used to include an amendment under Article 368, and if it does, whether it is subject to any limitations, and if so, what? It is contended that the word 'law' in Article 13(2) not only includes ordinary legislative law, but also constitutional law.

1077. It may not, in my view, be necessary to examine the submission, that an amendment under Article 368 is not made in exercise of the constituent power but has been made by a constituent body, if on examination of the provisions of Part III, there is intrinsic evidence therein which points to the irresistible conclusion that Article 13(2) was meant only to place an embargo on a law made by a Legislature so-called in contradistinction to an amendment of the Constitution under Article 368 which no doubt is also a law in its generic sense, as indeed was the view taken in *Sankari Prasad Singh Deo* v. *Union of India* and *State of Bihar*,[10] *Sajjan Singh* v. *State of Rajasthan*[11] and *Golaknath case* (supra) by some of the learned Judges. The framers of the Constitution have defined "law" in sub-clause (*a*) of clause (3) of Article 13 and that this definition would on the first impression appear to apply to only clause (2) of that Article. But it would also, having regard to the words "unless the context otherwise requires", apply to clause (1) thereof. While the expression "laws in force" has been defined in sub-clause (*b*) of clause (3) for the purposes of clause (1) as including law passed or made by Legislatures or other competent authorities before the commencement of the Constitution, an Ordinance, a bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law saved by Article 372 would, by virtue of sub-clause (*a*) of clause (3), equally apply to clause (1) of Article 13.

1078. Again, though sub-clause (*a*) of clause (3) contains an inclusive definition of the word 'law' and does not specifically refer to a law made by Parliament or the Legislatures of States, it cannot be, nor has it been denied, that laws made by them are laws within the meaning of Article 13(2). What is contended, however, is that it also includes an amendment of the Constitution or constitutional laws. No elaborate reasoning is necessary in support of the proposition that the word "law" in Article 13(2) includes a law made by Parliament or a Legislature of the State. When an Ordinance made either by the President under Article 123 or by a Governor under Article 213, in exercise of his legislative power which under the respective sub-clause (2) has the same force and effect as an act of Parliament or the Legislature of a State assented to by the President or the Governor, as the case may be, is included in Article 13(3)(*a*), a law passed by Parliament or a Legislature of a State under Article 245 which specifically empowers Parliament for making laws for the whole or any part of India or any part of a State and the Legislature of a State for the whole or any part of State, would be equally included within the definition of "law". Articles 246 to 255 deal with the distribution of legislative powers between Parliament and the State Legislatures to make laws under the respective Lists in the Seventh Schedule, and further provides under Article 248(1) and (2) that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List including the power of imposing tax not mentioned in either of those Lists.

1079. Whereas Article 13(3)(*a*) has specifically included within the definition of 'law', custom or usage having in the territory of India the force of law, and even though it has not specifically mentioned an amendment made under Article 368 or a law made by Parliament or a Legislature it would certainly include a law made by the latter organs by reason of the legislative provisions of the Constitution referred to above. Having regard to importance of the amending power, whether it is considered as a constituent power or as a constituted power, the omission to include it specifically would, it is contended, indicate that it was not in the contemplation of the framers of the Constitution to extend the embargo in Article 13(2) to an amendment under Article 368. To my mind what is difficult to envisage is that while the framers included minor legislative acts of the State within the definition of 'law' in Article 13(3), they did not think of including an amendment of the Constitution therein, even though attempts were made towards that end till the final stages of its passage through the Constituent Assembly. It is contended that the answer to this could be that the framers did not include specifically a law made by the Legislature in that definition, and as such all laws whether legislative or amendments of the Constitution would come within its purview. This argument loses its significance in view of the fact that the enumeration of laws like rule, bye-law, regulation and notification which have their source and existence in the legislative law clearly indicate the inclusion of a law made by Parliament or a Legislature of a State. It is not that the framers did not consider meticulously any objections to or defects in the definitions as I will show when dealing with the various stages of the consideration of the draft article.

---

[10] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[11] (1965) 1 SCR 933: AIR 1965 SC 845: (1965) 1 SCJ 377.

1080. It may be necessary first to examine whether in the context of the inclusive definition of 'law', and not forgetting that an amendment under Article 368 could also be termed 'law', the prohibition that the State cannot take away or abridge the rights conferred under any of the provisions of Part III is confined to those categories of law of which I have specifically referred, namely, to the law made by Parliament or a Legislature of the State and to those indicated in Article 13(3)(*a*). The law referred to in Article 14, clauses (3) and (5) of Article 16, Article 17, clauses (2) to (6) of Article 19, Article 20, Article 21, clauses (4) and (7) of Article 22, clause (1) of Article 23, clause (2) of Article 25, Article 31, clause (3) of Article 32, Articles 33, 34 and clause (*a*) of Article 35, is, in my view, a law which the Parliament or a Legislature of the State or both, as the case may be, is required to make for giving force to the rights or is permitted to make to restrict the rights conferred by Part III. In other words, the permissible limits are indicated therein. Further under Article 15 the words 'special provision' and in clause (4) of Article 16 the making of any provision by the State, and clause (2) of Article 23 imposing of a compulsory service by the State for public purposes, or preventing the State from doing or permitting it to take certain actions under Article 28, clause (2) of Article 29 and clause (2) of Article 30 can either be by an ordinary legislative law or by an order or notification issued by the Government which may or may not be under any law but may be in the exercise of a purely executive power of the Government of India or the Government of a State having the force of law.

1081. Even where reasonable restrictions are permitted as in clauses (2) to (6) of Article 19 or where restrictions or abrogation of the totality of fundamental rights contained in Part III have been permitted in respect of members of the armed forces or the forces charged with the maintenance of public order under Article 33, or where it is sought to indeminify persons in the service of the Union or a State or any other person, it is the Parliament that has been empowered to make a law in that regard. Article 35, it may be noticed, begins with a *non obstante* clause, "Notwithstanding anything in this Constitution—(*a*) Parliament shall have, and the Legislature of a State shall not have, power to make laws......... ..". This *non obstante* clause has the effect of conferring the power of legislation in respect of matters mentioned therein to Parliament exclusively which it would not have otherwise, had, because some of the powers were exercisable by the State Legislatures. Hidayatullah, J., however, thought that the opening words in Article 35 were more than the *non obstante* clause and excluded Article 368—a conclusion based on comparison of that Article with Article 105-A of the Australian Constitution in respect of which *New South Wales* v. *The Commonwealth*[12] had held that it was an exception to Section 128 (See *Golaknath's case* at p. 902). Wynes, however, did not agree with this view of the High Court of Australia: See *Legislative, Executive and Judicial powers in Australia*, pp. 695-698. With this view, Hidayatullah, J., did not agree. In my view it is unsafe to rely on cases which arise under other Constitutions. Apart from this, Article 35 is not in *pari materia* with Article 105-A of the Australian Constitution which deals with the binding nature of the financial agreement made thereunder. The analogy, is, therefore, inapplicable, nor is there anything in the subject-matter of Article 35 to safeguard it from being amended under Article 368. On the other hand, this article empowers Parliament to give effect to fundamental rights and gives no indication to delimit the power of amendment under Article 368.

1082. It is true that the Constitution itself has provided the limitations that can be imposed on the fundamental rights guaranteed in Part III, but those limitations can only be effected by ordinary law as opposed to constitutional law and for imposing those limitations an amendment of the Constitution is not needed. Once a right is conferred on the citizen, to what extent the right can be restricted, or where a State is prohibited from acting in any particular manner to what extent it is permitted, is to be regulated only by an ordinary law. If so, the bar against exceeding the permissible limits must *prima facie* be against the State making such a law. In the circumstances, could it be said that the framers of the Constitution contemplated the inhibition in Article 13(2) to operate on any thing other than ordinary law? To limit the extent and ambit of the power under Article 368 in which there is no reference to law, by including within the ambit of the definition of 'law' in Article 13(3)(*a*) for purposes of Article 13(2), an amendment effected under Article 368, is to restrict the power of amendment by a strained construction or to impute to the framers of the Constitution a lack of respect to the amending power by making the bar of Article 13(2) applicable to it by mere implication, when in respect of minor instruments they were careful enough to include them in the definition of 'law'.

1083. While this is so, a consideration of the conspectus of various rights in Part III when read with Article 13(2) would, in my view, prohibit the taking away or abridging of those rights by a law made by the Legislature, namely, the Parliament, Legislature of a State, or by executive action. This conclusion of mine will be substantiated if Article 13(2) is read along with each of the Articles in Part III, insofar as any of them contain the word 'law' which indeed it can be so read. The object of incorporating Article 13(2) was to avoid its repetition in each of the Articles conferring fundamental rights. Only one instance of this may be given in support of my conclusion. Clauses (2) to (6) of Article 19 which are limitations on the freedoms in Article 19(1)(*a*) to (*g*) respectively are couched in similar terms, and if I were to take one of these clauses for illustrating the point, it would amply demonstrate that the framers used the word 'law' in both Article 13(2) and clauses (2) to (6) of Article 19 only in the sense of an ordinary law. Sub-clause (*a*) of clause (1) of Article 19 and clause (2) of that Article, if so read with Article 13(2) of the Constitution as it stood on January 26, 1950, may be redrafted as under:

---

[12] 46 CLR 155.

> "19. (1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;
>
> * * * *
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this article and any law made in contravention of this clause shall, to the extent of the contravention, be void:
>
> Provided that nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to libel, slander, defamation contempt of court or any matter which offends against decency or morality or which undermines the security of, tends to overthrow, the State."

Clause (2) in the above draft incorporates the entire clause (2) of Article 13 except that instead of Part III the word 'article' has been used, and clause (2) of Article 19 has been incorporated as a proviso.

1084. In the alternative, if clauses (2) to (6) of Article 19 are read as a proviso to Article 13(2) they would appear as follows:

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:
>
> Provided nothing in sub-clause (*a*) of clause (1) of Article 19 shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against the decency or morality or which undermines the security of, tends to overthrow, the State."

In each of the clauses (3) to (6) of Article 19 the expression 'any existing law insofar as it imposes or prevents the State from making any law imposing' has been uniformly used, and if these clauses are read as provisos just in the same way as clause (2) of Article 19 has been read in either of the manner indicated above, the word 'law' in all these clauses as well as in clause (2) of Article 13 would be the same and must have the same meaning. Similarly, Article 16(3) and (5) and Article 22(3) may also be so read. In reading the above articles or any other article in Part III with Article 13(2) it appears to me that the words 'law', 'in accordance with law', or 'authority of law' clearly indicate that 'law' in Article 13(2) is that which may be made by the ordinary legislative organs. I shall also show, when I examine the various stages through which the corresponding draft article which became Article 13(2), passed through the Drafting Committee and the Constituent Assembly, that the proviso to Article 8 would lead to a similar conclusion.

1085. Though the word 'State' has a wider meaning and may include Parliament or Parliament and the State Legislature acting together when to effect an amendment under Article 368, in the context of the restrictions or limitations that may be imposed by law on certain specified grounds mentioned in any of the provisions of Part III, particularly those referred to above, could only be a law made by the Legislature otherwise than by amendment of the Constitution. For to impose any restriction or limitation within the permissible limits on the fundamental rights under any of the provisions of Part III, an amendment of the Constitution is not necessary and hence could not have been so intended. It is also submitted that the definition of the word 'State' in Article 12, read with Article 13(2) would prohibit agencies of the State jointly and separately from effecting an amendment, the same being a law, from abridging or taking away any of the rights conferred by Part III or in amending Article 13(2) itself. In this connection Hidayatullah, J., in *Golaknath's case* (supra), at p 865—read the definition of the word 'State' in Article 12 as connoting, "the sum total of all the agencies which are also individually mentioned in Article 12", and hence, "by the definition all the parts severally are also included in the prohibition". In other words, he has taken the definition to mean and connote that all the agencies acting together, namely, the Parliament and the Legislatures, and if the two Houses of Parliament under Article 368(1) or the two Houses of Parliament and the Legislatures acting together under the proviso, can effect an amendment that amendment would be as law made by the State within the meaning of Article 13(2). At p. 866 this is what he said: "If the State wields more power than the "functionaries there must be a difference between the State and its agencies such a Government, Parliament, the Legislatures of the States and the local and other authorities. Obviously, the State means more than any of these or all of them put together. By making the State subject to Fundamental Rights it is clearly stated in Article 13(2) that any of the agencies acting alone or all the agencies acting together are not above the Fundamental Rights. Therefore, when the House of the people or the Council of States introduces a Bill for the abridgement of the Fundamental Rights, it ignores the injunction against it and even if the two Houses pass the Bill the injunction is next operative against the President since the expression 'Government of India' in the General Clauses Act means the President of India. This is equally true of ordinary laws and laws seeking to amend the Constitution". He drew support from Article 325 of the Constitution of Nicargua in which specifically it was stated that, "The agencies of the Government, jointly or separately, are forbidden to suspend the Constitution or to restrict the rights granted by it, except in the cases provided therein". In our Constitution he observed, "the agencies of the State are controlled jointly and separately and the prohibition is against the whole force of the State acting either in its executive or legislative capacity". With great respect this argument is based on an assumption which is not warranted by the definition of the word 'State' in Article 12. Nor is it in my view permissible to draw support from a provision of another Constitution which is differently worded The assumption that 'State' would mean all the agencies of the Government jointly or separately when the agencies of the State have been separately enumerated, is not justified. The prohibition in Article 13(2) would be against each of them acting separately. There is no question of Parliament or the State Legislatures or Parliament or either local authorities or other authorities acting together or any one of these acting in combination. Nor under the Constitution can such combination of authorities acting together make a law. The State as Hidayatullah, J., envisages, because of the inclusive definition, means, "more than any of them or all of them put together" which in my view is a State in the political sense and not in a legal sense. Under Article 51 of the Directive Principles, it is enjoined that the State shall endeavour to promote international peace and security; or maintain just and honourable relations between nations, etc., which in the context, can only mean Government or Parliament of India. Item 10 of List I of the Seventh Schedule, read with Article 246 vests the power of legislation in respect of "foreign affairs, all matters which bring the Union into relation with the foreign countries" in those agencies. The words 'unless the context otherwise requires', in my view, refer to those agencies acting separately. If drawing an inference from other Constitution is permissible in interpreting a definition, and I have said that it is not, a reference to Article 9 in the Burmese Constitution would show that the definition of the State is not an inclusive definition, but it defines the State as meaning the several organs referred therein. I do not, therefore, think that this reasoning would indicate that Article 13(2) puts an embargo on an amendment made under Article 368, nor does it warrant the making of a distinction between the State and the Government in order to hold that these organs cannot acting together make an amendment affecting rights in Part III.

1086. Another reason for arriving at this conclusion is that if amendment to the Constitution is a 'law', the Constitution as such would also be a law. But the framers of the Constitution distinguished the 'Constitution' from 'law' or 'laws', by making evidence their intention by using the word 'law' in contradistinction to the 'Constitution' indicating thereby that the word 'law' wherever referred to, means only an ordinary legislative law, while the 'Constitution' as something distinct from it. In Article 60 the President, and in Article 159 the Governor, is required to take oath when assuming office, to preserve, protect and defend the *Constitution* and the *law*. Under Article 61 the President can only be impeached for the violation of the Constitution. While specifying the extent of the executive power in sub-clauses (*a*) and (*b*) of clause (1) of Article 73 it is provided by the proviso that the power referred to in sub-clause (*a*) shall not, save as expressly provided in this *Constitution* or *in any law* made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. Here the words 'law' and 'laws' are definitely referable to the law made by Parliament and the Legislature of the State. The oath that a Minister of the Union is to take under Article 75(1) is set out in Schedule III, that he will do right to all manner of people in accordance with the *Constitution* and the *law*. Judges of the Supreme Court and the High Court are required to uphold the Constitution and the laws: see Articles 124(6) and 219 each read with Schedule III. It is provided in Article 76(2) that the Attorney-General is required to discharge the functions conferred on him by or under this *Constitution* or *any other law* for the time being in force. Again in Article 148(5) dealing with the conditions of service of person serving in the Indian Audit and Accounts Department, etc., they are made subject to the provisions of this *Constitution* and of *any law* made by Parliament. Even though the framers referred to the Constitution as by law established in some of the provisions, they have, when dealing distinctly with the Constitution and the law or laws, specified them as referable to the legislative law. The Constitution, however, was not so described except where it is intended to be emphasised that it had the force of law as envisaged by the words 'as by law established'.

1087. If this view is correct, and I venture to suggest that it is, a question would arise as to whether Article 13(2) is really redundant, and should the Court so construe it as to impute to the framers an intention to incorporate something which has no purpose. The Court, it is well established, should not ordinarily construe any provision as redundant and, therefore, must give effect to every provision of a Statute or law. In support of this line of reasoning it is contended that insofar as Article 13(1) is concerned, 'a law in force' has been defined in Article 13(3)(*b*), but by virtue of Article 372(1) and Explanation I therein the same result would be achieved and any pre-Constitution or Constitutional law which acquires the force of law by virtue of that article is "subject to the other provisions" of the Constitution and consequently to the provisions in Part III. Similarly any law made after the Constitution came into force would be void to the extent of its repugnancy with any of the provisions of the Constitution including those in Part III because of the doctrine of *ultra vires*. If so, it is argued, there was no purpose in enacting Article 13(2). On the other hand, the petitioner's learned advocate submits that Article 13(2) has a purpose, in that among the laws in force there would be saved some laws of a constitutional nature which were in force in the erstwhile princely States or even under the Government of India Act, 1935, where the Governor-General had made orders of that nature. As it was pointed out to the Constituent Assembly by Sardar Vallabhbhai Patel on April 29, 1947, that such may be the position, Article 13(1), it is said, has been incorporated in Part III, and for the same reason in order to protect Fundamental Rights which were basic human freedoms from being taken away or abridged even by an amendment of the Constitution, that Article has been incorporated. A reference to the latter would show that what Sardar Vallabhbhai Patel said was that they had not sufficient time to examine in detail the effect of clause (2) of the draft article on the mass of existing legislation and that clause was, therefore, subject to examination of its effect on the existing law which will be done before the Constitution is finally drafted and the clause finally adopted. There is nothing in the proceedings or debates to indicate that certain constitutional laws were intended to be saved or that that laws was to include an amendment of the Constitution, nor is the contention that Article 13(1) was specially designed to save pre-existing constitutional laws notwithstanding that the Government of India Act and the Indian Independence Act were repealed by Article 395. If there be in force any constitutional laws other than those repealed these are by Article 372(1) given the same force as any of the ordinary legislative law subject to the other provisions of the Constitution and such laws continue to be in force only until altered, repealed or amended by a competent legislature or other competent authority. There is no indication whatever that these laws were accorded a status similar to any of the provisions of the Constitution, nor could they co-exist with them in the sense that they can only be dealt with by an amendment under Article 368. Kania, C. J. in *A. K. Gopalan's case* (supra), had no doubt pointed out that, "the inclusion of Article 13(1) and (2) appear to be a matter of abundant caution", and that, "Even in their absence if any of the Fundamental Rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid". Hidayatullah, J., as he then was, in *Sajjan Singh's case* (supra), at p. 961—commenting on the above passage of Kania, C. J., pointed out that, "The observation is not clear in its meaning. There was undoubtedly a great purpose which this article achieves. It is probable that far from belittling the importance of Article 13 the learned Chief Justice meant rather to emphasise the importance and the commading position of Fundamental Rights in that even without Article 13 they would have the same effect on other laws. To hold that Article 13 is framed merely by way of abundant caution, and serves no additional or intrinsic function of its own, might, by analogy persuade us to say the same of Article 32(1) because this Court would do its duty under Article 32(2) even in the absence of the guarantee". No one can deny that Article 13(2) has a purpose and that purpose, as Hidayatullah, J , pointed out, was meant rather to emphasise the importance and the commanding position of Fundamental Rights, because having regard to the history of the agitation for a Bill of Rights being inscribed in a Constitution, to which I have adverted earlier, and the great hope that was inspired in the people of this country that there are some fundamental basic rights which are guaranteed to them and which cannot be subject to the vagaries of the legislatures, the State was enjoined not to take away or abridge those rights Rights in Part III were intended to be made self-contained with the right of redress guaranteed to them by Article 32—unlike in the United States where the judiciary had to invoke and envolve the doctrine of judicial review over the years Mere general declarations of rights were without enforceability. As experience showed such general rights were found ineffective to check the growing power of the modern State, our framers examined judicial review of fundamental rights in various Constitution and provided in our Constitution an effective remedy against incroachment of these rights. Article 32(2) provided for a direct approach to the Supreme Court in cases where fundamental rights are infringed, which without that provision would only come before it by way of an appeal under Article 133 or by special leave under Article 136 from a decision of the High Court rendered under Article 226. It is this purpose that Article 13(2), read with Article 12 emphasises. The framers of our Constitution conscious of the pitfalls and difficulties that were confronted by the varying exercise of judicial review in America wanted to ensure that the doctrine of void and relatively void—a typically American concept—should find no place in our Constitution. If as stated in *Golaknath case* (supra), by the leading majority judgment and by Hidayatullah, J., that fundamental rights were not to be subject to an amending process, it is inconceivable that our framers who gave such meticulous care in inscribing those rights in the Constitution, as is evident from the proceedings in the Constituent Assembly, should not have specifically entrenched them against that process. I am aware of the contrary argument that if they wanted that the amending process in Article 368 should not be fettered by Article 13(2) they would have expressly provided for it either in Article 368 or in Article 13(2) as indeed attempts were made to that effect by moving suitable amendments which, later, at the concluding stages of the final Draft Constitution, as we shall presently see, were either withdrawn, not pressed or negatived. But this is neither here nor there, as indeed if the framers took the view that the embargo in Article 13(2) is only against legislative law, they may have felt that there was no need for any words of limitation which will make it inapplicable to Article 368.

1088. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing these provisions The Advocate-General of Maharashtra says until the decision of this Court in *H. H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Others* v. *Union of India*[13]—commonly known as *Privy Purses case*—debates and proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in *Travancore Cochin and Others* v. *Bombay Company Ltd.*,[14] the *Golaknath case* (supra), the *Privy Purses case* (supra), and *Union of India* v. *H. S. Dhillon*,[15] there are dicta against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion already arrived at. In *Golaknath case* (supra), as well as *Privy Purses case* (supra), the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of Fundamental Rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B. N. Rau to assist it. A memorandum was prepared by Shri B. N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr Ambedkar. The assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers Committee; and (3) Committee on the Fundamental Rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr. Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereupon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a

---

[13] (1971) 3 SCR 9: (1971) 1 SCC 85.

---

[14] 1952 SCR 1112: AIR 1952 SC 366: 1952 SCJ 527: (1952) 3 STC 434.

[15] (1972) 2 SCR 33: (1971) 2 SCC 779.

Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and what attempts were made to introduce words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me?

1089. The various stages of the Constituent Assembly proceedings, while considering the draft Articles 8 and 304 corresponding to Articles 13 and 368 respectively, would show that attempts were made to introduce amendments to both these articles to clarify that the embargo in Article 13(2) does not apply to an amendment made under Article 368. First, Shri K. Santhanam, one of the members of the Constituent Assembly moved an amendment on April 29, 1947 to clause (2) of the draft submitted to the Constituent Assembly along with the Interim Report on Fundamental Rights. This amendment was that for the words "nor shall the Union or any unit make any law taking away or abridging any such right", the following be substituted:

> "Nor shall any such right be taken away or abridged except by an amendment of the Constitution."

The sponsor explained "that if the clause stands as it is even by an amendment of the Constitution" we shall not be able to change any of these rights if found unsatisfactory. In some Constitutions they have provided that some parts of the Constitution may be changed by future constitutional amendments and other parts may not be changed. In order to avoid any such doubts, I have moved this amendment and I hope it will be accepted". This amendment was accepted by Sardar Vallabhbhai Patel and adopted by the Constituent Assembly. Clause (2), after it was so amended, was as follows:

> "All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency. Nor shall any such right be taken away or abridged except by an amendment of the Constitution."

Even as the clause stood originally in the draft, it was only the 'Union' or any 'Unit' that was prohibited from making a law taking away or abridging any such right. At that stage there was nothing to show that a provision for amendment of the Constitution was either drafted or was before the Constituent Assembly for consideration. But otherwise also, it was not a case of the "Union" or 'Union' and 'the unit' being prevented from making a law. In order to justify the submission that all the organs of the State including the 'Union' or the 'Union' and the 'Unit' were prevented from effecting an amendment of the Constitution, the only indication is that the law which was prohibited from taking away or abridging fundamental rights was the law of the 'Union' or any 'unit'. The amendment of Shri Santhanam was incorporated by the draftmen in the Supplementary Report on

Fundamental Rights which was presented to the Constituent Assembly on August 25, 1947, but subsequently this amendment of Shri K. Santhanam incorporated in the draft article was deleted by the Drafting Committee. After the Draft Constitution was submitted to the President of the Constituent Assembly on February 21, 1948, and was given wide circulation, there appears to have been some criticism with respect to what had then become draft Article 8(2 , which was in the following terms:

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:
>
> Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law."

The note relating to the addition of the proviso is stated thus:

> "The proviso has been added in order to enable the State to make laws removing any existing discrimination. Such laws will necessarily be discriminatory in a sense, because they will operate only against those who hitherto enjoyed an undue advantage. It is obvious that laws of this character should not be prohibited."

The Constitutional Adviser's note to the Drafting Committee showed that a critic had pointed out that "clause (2) of Article 8 may be held as a bar to the amendment of the provisions of the Constitution relating to the fundamental rights by a law passed under draft Article 304, and it should, therefore, be made clear that there is no restriction on the power of Parliament to amend such provisions under Article 304". The comment of the Constitutional Adviser to this objection was that "clause (2) of Article 8 does not override the provisions of Article 304 of the Constitution. The expression 'law' used in the said clause is intended to mean 'ordinary legislation'. However, to remove any possible doubt, the following amendment may be made in Article 8:

> "In the proviso to clause (2) of Article 8, after the words 'nothing in this clause shall', the words 'affect the provisions of Article 304 of this Constitution or' be inserted."

The Drafting Committee does not appear to have accepted this suggestion, because the proviso remained as previously drafted, until it was deleted as a result of Amendment No. 252 which was standing in the name of Mehboob Ali Beg. On November 25, 1948, Pandit Lakshmi Kanta Maitra in moving this Amendment said—"The purpose of this amendment is self-evident, and as I have been strictly enjoined not to make any speech I simply move this amendment". This amendment was adopted on November 29, 1948, and the proviso was deleted. (See *C. A. D.*, Vol. VII, pp. 611 and 645).

1090. How meticulously this article was considered, can be seen from the proceedings on the objection of Naziruddin Ahmed that the words "custom or usage" in the definition of 'law' in Article 8(3)(*a*) corresponding to Article 13(3)(*a*) would apply to Article 8(2), but the State does not make a 'usage or custom'. Dr. Ambedkar pointed out that that will apply to Article 8(1) which deals with 'law in force', but Naziruddin Ahmed insisted that it does not, and that he was no wiser after the explanation given by Dr. Ambedkar that the definition of law is distributive. Dr. Ambedkar then said that the amendment of Naziruddin Ahmed creates some difficulty which it is necessary to clear up and ultimately to avoid any difficulty he moved an amendment to clause (3) of Article 8 to read "unless the context otherwise requires" which governed clauses (*a*) and (*b*). This was adopted. (See *C. A. D.*, Vol. VII, p. 644). It was after this that the proviso was deleted.

1091. It would appear from the proviso before it was deleted, if read with clause (2) of draft Article 8, as also the note showing the purpose for which it was incorporated, that the law referred to therein was a legislative law. It could not by any stretch of the language be construed as including an amendment under draft Article 304, because the proviso was making the restriction in clause (2) of Article 8 inapplicable to the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law. If the 'State' and the 'law' have to be given a particular meaning in the proviso the same meaning has to be given to them in clause (2) and since the proviso clearly envisages a legislative law it furnishes the key to the interpretation of the word 'law' in clause (2) of draft Article 8 that it is also a legislative law that is therein referred.

1092. To Article 304 also amendments were moved—one of them, Amendment No. 157 was in the name of Shri K. Santhanam, but he said he was not moving it. (See *C. A. D.*, Vol. IX, p. 1643). Both the Attorney-General as well as the Advocate-General of Maharastra said that they were not able to find out what these amendments were. But even assuming that this amendment was designed to make the embargo under Article 13(2) applicable to Article 368, no inference can be derived therefrom. On the other hand an attempt was made by Dr. Deshmukh to entrench Fundamental Rights He moved Amendment No. 212 to insert the following Article 304-A after Article 304:

> "304-A Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and *ultra vires* of any Legislature."

This amendment after Dr. Ambedkar's speech regarding the scope of the amendment under Article 304 was, by leave, withdrawn. (*See* C. A D., Vol. IX, p. 1665).

1093. Earlier when the Drafting Committee was considering the objectives, there was a proposal by Shri K Santhanam, Mr. Ananthasayanam Ayyangar, Mr. T. T. Krishnamachari and Shrimati G. Durgabai that Parts III, IV, IX and XVI be added in the proviso to Article 304, but it was pointed out by the Constitutional Adviser that that amendment involved a question of policy. The drafting Committee did not adopt this amendment. If this amendment had been accepted, the amendment of the Fundamental Rights could be affected by the procedure prescribed for amendment which would be by two-thirds majority of each of the Houses of Parliament as well as by ratification by resolutions of not less than half the State Legislatures. Even this attempt does not give any indication that fundamental rights in Part III could not be amended under Article 368 or that 'law' in Article 13(2) is not the ordinary legislative law, but would include an amendment under Article 368. An attempt was made to show that on September 17, 1949, Dr. Ambedkar while speaking on draft Article 304 had said that Part III was not amendable. While adverting to the fact that they had divided the articles into three categories, he pointed out that the first category was amendable by a bare majority, and as to the second category he had said: "If future Parliament wishes to amend any particlar article which is not mentioned in Part III or Article 304, all that was necessary for them is to have two-thirds majority". The third category for the purposes of amendment he explained required two-thirds majority plus ratification. It is submitted on behalf of the first respondent that what was stated about Part III being excepted from the second category was a mistake and that he must be thinking that, along with Article 304, Part III was also included in the third category. The Advocate-General of Nagaland said Part III was a mistake for third category. Instead of third category, he either said, or is reported to have said, Part III. Whether it is a correct reading of his speech or not, it is not relevant, for in interpreting a provision the words used, the context in which it was used, the purpose which it intended to subserve in the scheme of the Constitution will alone have to be considered. For the same reasoning the fact that none of the members who were also members of the Provisional Parliament ever entertained a doubt as to the non-amendability of Part III when the Constitution (First Amendment) Bill was debated and later enacted as an Act is not relevant.

1094. In the view I take on the construction of Article 13, read with the other provisions of Part III, Article 13(2) does not place an embargo on Article 368 for amending any of the rights in Part III, and it is, therefore, not necessary to go into the question whether the leading majority judgment is right in finding the power of amendment in the residuary Entry 97 of List I of Schedule VII, nor is it called for, having regard to the majority decision that the power of amendment is to be found in Article 368 itself. Whether the power is implied, what is the width and whether Parliament can enlarge that power may have to be considered, but that Article 368 contains the power and the procedure of amendment can admit of little doubt, as was held by the majority in *Golaknath's case* (supra), by five Judges and Hidayatullah, J. It may, also be noticed that the leading majority judgment did not express any view as to whether under the proviso to Article 368, by amending that article itself, fundamental rights could be amended. (See Subba Rao, C. J., at p. 805).

1095. The question then arises, whether the Twenty-Fourth Amendment is valid, and if it is valid, whether Article 368 as amended is subject to any limitation and if so, what? The objects and reasons of the Twenty-Fourth Amendment Bill set out the purpose for which it was enacted and the mischief it sought to remedy. It is stated in Para 2 thereof thus:

> "The Bill seeks to amend Article 368 suitably for the purpose and makes it clear that Article 368 provides for amendment of the Constitution as well as procedure therefor. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent thereto. The Bill also seeks to amend Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368."

What in fact the amendment effected will become clear, if the relevant provisions of Article 368, both before and after the amendment was made, are read in juxtaposition along with a new sub-clause (4) added to Article 13.

Before the Amendment	*After the Amendment*
"**368.** *Procedure for amendment of the Constitution.*—An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:	"**368.** *Power of Parliament to amend the Constitution and procedure therefor.*—(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:
Provided that if such amendment seeks to make any change in—	Provided that if such amendment seeks to make any change in—
* * * * * * * * *	* * * * * * * * *
the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
	(3) Nothing in Article 13 shall apply to any amendment made under this article. ◆ ◆ ◆ ◆ **13**(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

1096. The above amendment seeks to provide—(*i*) that the source of power to amend is in Article 368; (*ii*) that when Parliament seeks to make a constitutional amendment it does so "in exercise of its constituent power"; (*iii*) that the power to amend was by way of addition, variation or repeal; (*iv*) that the bar in Article 13 against abridging or taking away any of the Fundamental Rights does not apply to any amendment made under

SCC Online Academic

Article 368; (*v*) that nothing in Article will apply to an amendment of the Constitution under Article 368; (*vi*) that the words "any provision of the Constitution" were added so that "any" were to mean "every provision"; and (*vii*) that it is obligatory on the President to give his assent to any Bill duly passed under that Article.

1097. In so far as the contention that Article 13(2) is a bar to constitutional amendments is concerned, I have already given my reasons why I consider that argument as not available to the petitioner inasmuch as the inhibition contained therein is only against ordinary legislative actions. The question, however, is whether Article 13(2) which bars the taking away or abridging the Fundamental Rights by Parliament, or Legislatures of the States and other enactments, specified in Article 13(3)(*a*) is or is not an essential feature. If it is not, it can be amended under Article 368. Recognising this position the petitioner submits that if the effect of amending Article 368 and Article 13 is to permit the removal of the fetter of Article 13 on the ordinary legislative laws which can thereafter be empowered and left free to abrogate or take away fundamental rights, it would be an essential feature.

1098. The question whether there are any implied limitations on the power to amend under Article 368 or whether an amendment under that Article can damage or destroy the basic features of the Constitution would depend, as I said earlier, on the meaning of the word "amendment" before the Twenty-Fourth Amendment. If that word has a limited meaning, which is the case of the petitioner, it is contended that that power of amendment could not be enlarged by the use of the words "amend by way of addition, variation and repeal".

1099. It may be mentioned that arguments similar to those which were addressed before us were advanced in *Golaknath's case* (supra) and namely, (*i*) that the expression 'amendment' in Article 368 has a positive and negative content and that in exercise of that power Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation; (*ii*) that if the fundamentals would be amenable to the ordinary process of amendment with a special majority the institution of the President can be abolished, the Parliamentary executive can be abrogated, the concept of federation can be obliterated and in short, the sovereign democratic republic can be converted into a totalitarian system of Government. The leading majority judgment, though it found that there was considerable force in the argument, said that they were relieved of the necessity to express an opinion on this all important question, but so far as the Fundamental Rights are concerned, the question raised can be answered on a narrow basis. Subba Rao, C. J., observed at p. 805: "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard".

1100. Hidayatullah, J., on the other hand, dealing with implied limitations by reference to Article V of the United States Constitution, and the decisions rendered thereunder pointed out that although there is no clear pronouncement of the United States Supreme Court a great controversy exists as to whether questions of substance can ever come before the Court and whether there are any implied limitations upon the amendatory power. After considering the views of text-book writers, particularly that of Orfield, and the position under the *English and the French Constitutions* (see pp. 870-877), he observed at p. 878: "It is urged that such approach makes society static and robs the States of its sovereignty. It is submitted that it leaves revolution as the only alternative if change is necessary. The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental. What is being suggested by the counsel for the State is itself a revolution because as things are that method of amendment is illegal".

1101. Wanchoo, J., rejected the doctrine of implied limitations though he was doubtful if the Constitution can be abrogated or another new Constitution can be substituted. (See p. 838). At p. 836 he said, "We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under Article 368 and have come to the conclusion that no limitations can be and should be implied upon the power of amendment under Article 368..........." We fail to see why if there was any intention to make any part of the Constitution unamendable, the Constituent Assembly failed to include it expressly in Article 368.......... on the clear words of Article 368 "which provides for amendment of the Constitution which means any provision thereof, we cannot infer any implied limitations on the power of amendment of any provision of the Constitution, be it basic or otherwise". It was further observed at p. 831: "that the President can refuse to give his assent when a Bill for amendment of the Constitution is presented to him, the result being that the Bill altogether fails, for there is no specific provision for anything further to be done about the Bill in Article 368 as there is in Article 111".

1102. Bachawat, J., noticed the argument on the basic features but did not express any opinion because he said "it is sufficient to say that the Fundamental Rights are within the reach of the amending power". Ramaswami, J., on the other hand rejected the thesis of implied limitations, because Article 368 does not expressly say so. He said at p. 933: "If the Constitution-makers considered that there were certain basic features of the Constitution which were permanent it is most unlikely that they should not have expressly said in Article 368 that these basic features were not amendable".

1103. During the course of the lengthy arguments on behalf of the petitioners and the respondents, we have been taken on a global survey of the Constitutions of the various countries. In support of the rival contentions, there were cited before us innumerable decisions of the Supreme Court and the State Courts of the United States of America, and of the Courts in Canada, Ireland, Australia and of the Privy Council. A large number of treatise on constitutional law, views of academic lawyers, the applicability of natural law or higher law principles, extracts from Laski's *Grammar of Politics*, history of the demand for fundamental rights, and the speeches in the Constituent Assembly and the Provisional Parliament during the deliberations on the Constitution (First Amendment) Bill, were also referred to. The able arguments addressed to us during these long hearings, with great industry and erudition and the alacrity with which the doubts expressed by each of us have been sought to be cleared by the learned Advocates for the petitioner, the Attorney-General, the Solicitor General and by the Advocates-General of the States and the learned Advocates who intervened in those proceedings, have completely eviscerated the contents of the vital and far-reaching issues involved in this case, though some times some aspects tended to hover over the *terra firma* and sometimes skirted round it, particularly when the views of academic writers who had the utmost freedom to express on hypothetical problems unrelated to concrete issues falling for a decision in any case, were pressed on us. The *a priori* postulates of some of the scholars are not often easy of meeting the practical needs and limitations of the tenacious aspects of the case precedents which makes our law serviceable. There have again been arguments for taking consequences into consideration which really highlighted what would be the dire consequences if the result of the decisions being one way or the other but this court ought not to be concerned with these aspects, if otherwise our decision is in accordance with the view of the law it takes. We should free ourselves of any considerations which tend to create pressures on the mind. In our view, it is not the gloom that should influence us, as Milton said, "we cannot leave the real world for a utopia but instead ordain wisely", and, if I may add, according to the well-accepted rules of construction and on a true interpretation of the constitutional provisions.

1104. Lengthy arguments on the rules of construction were addressed, by referring particularly to a large number of American cases to show what our approach should be in determining constitutional matters, having regard to the paramount need to give effect to the will of the people which the Legislatures and the Governments represent and for exercising judicial restraint. I must confess that some of these arguments show that the tendency has been to depend more on the views of Judges from other lands, however eminent, when we have in this, the Highest Court of the land during the last over two decades, forged an approach of our own and set out the rules applicable to the interpretation of our Constitution. There is no constitutional matter which is not in some way or the other involved with political, social or economic questions, and if the Constitution-makers have vested in this Court a power of Judicial review, and while so vesting, have given it a prominent place describing it as the heart and soul of the Constitution, we will not be deterred from discharging that duty, merely because the validity or otherwise of the legislation will affect the political or social policy underlying it. The basic approach of this Court has been, and must always be, that the Legislature has the exclusive power to determine the policy and to translate it into law, the constitutionality of which is to be presumed, unless there are strong and cogent reasons for holding that it conflicts with the constitutional mandate. In this regard both the Legislature, the executive, as well as the judiciary are bound by the paramount instrument, and, therefore, no court and no Judge will exercise the judicial power dehors that instrument, nor will it function as a supreme legislature above the Constitution. The bona fides of all the three of them has been the basic assumption, and though all of them may be liable to error, it can be corrected in the manner and by the method prescribed under the Constitution and subject to such limitations as may be inherent in the instrument.

1105. This Court is not concerned with any political philosophy, nor has it its own philosophy, nor are Judges entitled to write into their judgments the prejudices or prevalent moral attitudes of the times, except to judge the legislation in the light of the felt needs of the society for which it was enacted and in accordance with the Constitution. No doubt, political or social policy may dominate the legal system. It is only when as I said, the Legislatures in giving effect to them translate it into law, and the Courts, when such a measure is challenged, are invited to examine those policies to ascertain its validity, it then becomes a legal topic which may tend to dominate sometimes to its detriment.

1106. The citizen whose rights are affected, no doubt, invokes the aid of the judicial power to vindicate them, but in discharging its duty, the Courts have nothing to do with the wisdom or the policy of the Legislature. When the Courts declare a law, they do not mortgage the future with intent to bind the interest of the unborn generations to come. There is no everlasting effect in those judgments, nor do they have force till eternity as it were. The concept, on the other hand, is that the law declared in the past was in accord with the settled judgment of the society, the social and economic conditions then existing, and that if those judgments are not likely to subserve the subsequent generations or the requirements and needs of the society as it may be then conditioned, they will have to be changed by the process known to law, either by legislative action or judicial re-review where that is possible. The Courts, therefore, have a duty, and have indeed the power, to re-examine and re-state the law within the limits of its interpretative function in the fullness of the experience during which it was in force so that it conforms with the socio-economic changes and the jurisprudential outlook of that generation. The words of the law may be like coats of Biblical Joseph, of diverse colours and in the context in which they are used they will have to be interpreted and wherever possible they are made to subserve the felt-needs of the society. This purpose can hardly be achieved without an amount of resilience and play in the interpretative process.

1107. On the desirability of drawing heavily or relying on the provisions of the Constitutions of other countries or on the decisions rendered therein, a word of caution will be necessary. It cannot be denied that the provisions of the Constitutions of other countries are designed for the political, social and economic outlook of the people of those countries for whom they have been framed. The seed of the Constitution is sown in a particular soil and it is the nature and the quality of the soil and the climatic conditions prevalent there which will ensure its growth and determine the benefits which it confers on its people. We cannot plant the same seed in a different climate and in a different soil and expect the same growth and the same benefit therefrom. Law varies according to the requirements of time and place. Justice thus becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein. The difficulty, to my mind, which foreign cases or even cases decided within the Commonwealth where the Common Law forms the basis of the legal structure of that unit, just as it is to a large extent the basis in this country, is that they are more often than not concerned with expounding and interpreting provisions of law which are not in *pari materia* with those we are called upon to consider. The problems which confront those Courts in the background of the State of the society, the social and economic set-up, the requirements of a people with a totally different ethics, philosophy, temperament and outlook differentiate them from the problems and outlook which confront the courts in this country. It is not a case of shutting out light where that could profitably enlighten and benefit us. The concern is rather to safeguard against the possibility of being blinded by it. At the very inception of a constitutional democracy with a Federal structure innovated under the Government of India Act, 1935, a note of caution was struck by the Chief Justice of India against following even cases decided on the constitutions of the Commonwealth units, which observations apply with equal force, if not greater, to cases decided under the American Constitution. Gwyer, C. J., in *In re: The Central Provinces and Berar Act No. XIV of 1938,*[16] which was the very first case under the 1935 Act, observed at p. 38: "But there are few subjects on which the decisions of other Courts require to be treated with greater caution than of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another". This observation was approved and adopted by Gajendragadkar, C. J. (speaking for seven Judges) in *Special Reference 1 of 1964*.[17]

---

[16] 1939 FCR 18: AIR 1939 FC 1.

1108. The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution. For one thing, the decisions of the Supreme Court of the United States though were for the benefit of the people and yet for decades those inconvenient decisions were accepted as law by the Government until the approach of the Court changed. The restraint of the people, the Government and the Court, and the patience with which the inconveniences, if any, have been borne, have all contributed to the growth of the law and during this long period the Constitution of the United States has been only amended 24 times. The amending power under the American Constitution is a difficult process in that it is vitally linked with its ratification by the people through their representatives in the State Legislatures or in the Conventions. These decisions, therefore, are of little practical utility in interpreting our Constitution which has devised altogether different methods of amendments. No doubt, the rules of construction which our Courts apply have been drawn from the English decisions and the decisions of the Privy Council, the latter of which declared the law for the country until its jurisdiction was abolished; and even today the decisions of the Courts in England, the Commonwealth countries, and the United States of America on matters which are *pari materia* are considered as persuasive.

1109. For the proposition that for ascertaining the meaning of the word 'amendment', the object of and the necessity for amendment in a written Constitution must be considered, namely,—

(*a*) it is necessary for changing the Constitution in an orderly manner, as otherwise the Constitution can be wrecked by extra Constitutional method or by a revolution;

(*b*) as the very object is to make changes in the fundamental or organic law, namely, to change the fundamental or basic principles of the Constitution, the power of amendment cannot be said to be confined to only changing non-essential features.

1110. The Attorney-General has cited from the writings of several authors of whom I may refer to a few passages from the following:

Woodrow Wilson in his book on '*Constitutional Government in the United States*', said:

"A constitutional government, being an instrumentality for the

---

[17] (1965) 1 SCR 413 at 487: AIR 1965 SC 747: (1965) 1 SCJ 847.

> maintenance of liberty, is an instrumentality for the maintenance of a right adjustment, and must have a machinery of constant adaptation." (pages 4-6).
>
> "It is, therefore, peculiarly true of constitutional government that its atmosphere is opinion, the air from which it takes its breath and vigour. The underlying understandings of a constitutional system are modified from age to age by changes of life and circumstances and corresponding alterations of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the nation's needs and purposes." (page 22).

1111. Roger Sherman Hoar in his book on "*Constitutional Conventions—Their Nature, Powers and Limitations*", speaking of the American Constitution as the one based upon popular sovereignty, says:

> "The Federal Constitution was ordained and established by the people of the United States" (U. S. Constitution, Preamble) and guarantees to each of the several states "a republican form of government" (U. S. Constitution, Article IV). This means, in other words, a representative form. It is founded upon the theory that the people are fit to rule, but that it would be cumbersome for them to govern themselves directly. Accordingly, for the facilitation of business, but for no other purposes the people choose from their own number representatives to represent their point of view and to put into effect the collective will." (page 11).

Quoting from Jameson's "*Works of Daniel Webster*", it is again stated at p. 12:

> "These principles were recognised by our forefathers in framing the various Bills of Rights, which declare in substance that, as all power resides originally in the people, and is derived from them, the several magistrates and officers of government are their substitutes and agents and are at all times accountable to them.
>
> The various agents of the people possess only such power as is expressly or impliedly delegated to them by the Constitution or laws under which they hold office; and do not possess even this, if it happen to be beyond the power of such Constitution or laws to grant".

A question that naturally arises is, are the above postulates *basic to* our Constitution?

1112. After referring to these passages, the Attorney-General submitted that the people of India have, as expressed in the Preamble, given the power to amend the Constitution to the bodies mentioned in Article 368. These bodies represent the people, and the method to amend any part of the Constitution as provided for in Article 368 must alone be followed. In his submission and other method, for example, Constituent Assembly or Referendum would be extra-constitutional or revolutionary. Article 368 restricts only the procedure of the manner or form required for amendment, but not the kind or character of the amendment that may be made. There are no implied limitations on the amending power under Article 368. It is the people who have inscribed Article 368 in the Constitution. In the numerous American cases cited before us, there is a constant reference to the people taking part in the amending process through the Conventions or ratification by the Legislatures which the judiciary has been treating as ratification by the people. In that context the word 'amendment' has been construed widely because when the sovereign will of the people is expressed in amending the

Constitution, it is as if it were they who were expressing the original sovereign will represented in the convention which drafted the Constitution. There has been even a divergence of opinion among the writers in the U.S. as to whether the entrenched provisions for the representation of the States in the Senate which could not be amended without the consent of the State affected can be amended even where all the States except the State concerned have ratified the taking away or abridging that right. With this or the several aspects of the American Constitution we are not called upon to expound nor have we any concern with it except with the claim of the petitioner that the fundamental rights have been reserved by the people to themselves and the counter-claim by the Attorney-General that it is the people who have inscribed Article 368 by investing that Article with the totality of the sovereignty of the people which when exercised in the form and manner prescribed in that Article would amend any provision of the Constitution without any limitations as to the nature or kind of the amendment. The people, the learned Attorney-General submitted, have been eliminated from the amending process because being illiterate and untutored they would not be able to take part in that process with proper understanding or intelligence. This to my mind, appears somewhat incongruous. When they can be trusted to vote in much more complicated issues set out in election manifestos involving economic and political objectives and social benefits which accrue by following them, surely they could be trusted with deciding on direct issues like amending the Constitution. But the whole scheme of the Constitution shows it is insulated against the direct impact from the people's vote, as can be seen, firstly, by the electoral system under which it may often happen that a minority of voters can elect an overwhelming majority in Parliament and the Legislatures of the States, while the majority vote is represented by a minority of representatives as is evident from the affidavit filed in respect of the recent elections by the Union of India on March 12, 1973, and secondly, where a President is elected by proportional representation of the members of the Legislatures. This situation could not have been unknown to the framers can be gathered from the speech of Dr. Ambedkar who said: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a topdressing on an Indian soil, which is essentially undemocratic". (*C. A. D.*, Vol. VII, p. 38). In any case this aspect need not concern this Court as it deals with what has already been done, but since so much has been said about the people and the amending power in Article 368 as representing the sovereign will of the people, I have ventured to refer to this topic.

1113. There is no doubt some warrant in support of the proposition that people have reserved to themselves the fundamental rights, as observed by Patanjali Sastri, J., in *A. K. Gopalan v. State of Madras*,[18] to which a reference has been made earlier, and, therefore, it is submitted that these rights cannot be taken away or abridged even by an amendment of the Constitution. Neither of these submissions accord with the facts of history though the Preamble which was adopted as a part of the Constitution on October 17, 1949, says so. (See with respect to the adoption of the Preamble as a part of the Constitution, *C. A. D.*, Vol. X, p. 456). To digress somewhat, it appears that the observations in *In re Berubari Union and Exchange of Enclaves*,[19] that the Preamble was not part of the Constitution does not seem to have taken note of the fact that the Constituent Assembly had debated it and adopted the resolution, "That the Preamble stand part of the Constitution". It appears to me that a comparison with Article V of the U. S. Constitution providing for an amendment of that Constitution, with Article 368 of our Constitution, would show that there is no resemblance between the amending procedure provided in either of them. Such a comparison would, in my view, be misleading, if we were to apply the concepts and dicta of the eminent Judges of the Supreme Court of the U. S. in interpreting our Constitution. If we were to accept the contention of the learned Attorney-General that the sovereignty is vested in Article 368, then one is led to the conclusion on an examination of the history of the Constitution-making that the people of India had never really taken part in the drafting of the Constitution or its adoption, nor have they been given any part in its amendment at any stage except indirectly through representatives elected periodically for conducting the business of the Government of the Union and the States. It cannot be denied that the members of the Constituent Assembly were not elected on adult franchise, nor were the people of the entire territory of India represented therein even on the very limited franchise provided for under the Cabinet Mission Plan of May 16, 1946, which was restricted by the property, the educational and other qualification to approximately 15% of the country's population comprising of about 40 million electors. The people of the erstwhile princely States were not elected to the Assembly though the representatives of those States may have been nominated by the rulers. A day before the transfer of power on August 15, 1947, the Indian States were only subject to the paramountcy of the British Crown. On August 15, 1947, all of them, except Hyderabad, Junagadh and Jammu and Kashmir, had voluntarily acceded to the Dominion of India.

---

[18] 1950 SCR 88 at 100: AIR 1950 SC 27: 1950 SCJ 174.

[19] (1960) 3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

1114. The Objectives Resolution which claims power from the people to draft the Constitution was introduced in the Constituent Assembly on December 13, 1946, when the Constituent-Assembly met for the first time and at a time when the Muslim League boycotted the session (see *C. A. D.*, Vol. I, p. 59). The 4th clause of that Resolution provided that all power and authority of the Sovereign India, its constituent parts and organs of government are derived from the people. The Resolution also said that in proclaiming India as an Independent Sovereign Republic and in drawing up for her future governance a Constitution there shall be guarantee and secured to all the people of India, Justice, social, economic and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes. This Resolution was adopted on January 22, 1947 with utmost solemnity by all members standing. (See *C. A. D.*, Vol. II, p. 324).

1115. While the claim was so made and at the time when the Resolution was adopted, the legal sovereignty over India remained vested in the British Crown and British Parliament, and when that power was transferred, it was transferred to the Constituent Assembly by the Indian Independence Act, 1947, Sections 6 and 8 of which conferred on the Constituent Assembly the power to enact a Constitution, as well as the full powers to make laws which were not to be void or inoperative on the ground that they are repugnant to the laws of England, or to the provisions of the Indian Independence Act, or any existing or future Act, of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of the Dominion of India, shall include the power to *repeal or amend* any such Act, order, rule or regulation in so far as it is part of the law of the Dominion [See sub-section (2) of Section 6]. These powers of the Legislature of the Dominion, under sub-section (1) of Section 8, for the purposes of making a Constitution, were conferred on the Constituent Assembly and reference in the Act to the Legislature of the Dominion was to be construed accordingly.

1116. It was only in November, 1949, after the work of the framing of the Constitution was completed that the ruling Princes accepted it on behalf of themselves and the people over whom they ruled. The Constitution was not ratified by the people but it came into force, by virtue of Article 394, on January 26, 1950. Article 395 repealed the Indian Independence Act, 1947 and the Government of India Act, 1935.

1117. Reference may also be made to the fact that during the debates in the Constituent Assembly it was pointed out by many speakers that that Assembly did not represent the people as such, because it was not elected on the basis of adult franchise, that some of them even moved resolutions suggesting that the Constitution should be ratified by the people. Both the claim and the demand were rejected. Dr. Ambedkar explained that, "the Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting partisans seeking to carry amendments to the Constitution to facilitate to the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise, can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it". (*C. A. D.*, Vol. VII, pp. 43-44).

1118. At the final stages of the debate on the amending article, Dr. Ambedkar replying to the objection that the Constituent Assembly was not a representative assembly as it has not been elected on an adult franchise, that a large mass of the people are not represented, and consequently in framing the Constitution the Assembly has no right to say that this Constitution should have the finality which Article 304 proposes to give it, said—"Sir, it may be true that this Assembly is not a representative assembly in the sense that Members of this Assembly have not been elected on the basis of adult suffrage. I am prepared to accept that argument, but the further inference which is being drawn that if the Assembly had been elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater political knowledge is an inference which I utterly repudiate". (*C. A. D.*, Vol. IX, p. 1663).

1119. The fact that the preamble professed in unambiguous terms that it is the people of India who have adopted, enacted and "given to themselves this Constitution", that the Constitution is being acted upon unquestioned for the last over twenty-three years and every power and authority is purported to be exercised under the Constitution; and that the vast majority of the people have, acting under the Constitution, elected their representatives to Parliament and the State Legislatures in five general elections, makes the proposition indisputable that the source and the binding force of the Constitution is the sovereign will of the people of India.

1120. On this assumption no state need have unlimited power and indeed in Federal Politics no such doctrine is sustainable. One has only to take the examples of U. S. A., Australia or Canada, and our own where the Central and the State Legislatures are supreme within the respective fields allotted to them. Any conflict between these is determined by the Supreme Court, whose duty is to declare the law. Those brought up in the unitary State find it difficult to recognise such of those limitations as are found in Federal Constitutions. Constitutions have been variously described as rigid or flexible, controlled or uncontrolled, but without going into these concepts it is clear that if the State is considered as a society, "to which certain indefinite but not unlimited powers are attributed then there is no difficulty in holding that the exercise of State power can be limited" (A. L. Goodhart; *English Law and the Moral Law*", p. 54). Even in a unitary State like the United Kingdom where it is believed that the Queen in Parliament is Supreme, Professor A. L. Goodhart in the book referred to above points out that this is as misleading as the statement that the Queen's consent is necessary. After referring to Dicey, Coke and Blackstone, that parliamentary Government is a type of absolute despotism, he says, "Such a conclusion must be in conflict not only with our sense of what is fitting, but also with our recognition of what happens in fact. The answer is, I believe, that the people as a whole, and Parliament itself, recognise that under the unwritten Constitution there are certain established principles which limit the scope of Parliament. It is true that the Courts cannot enforce these principles as they can under the Federal system in the United States, but this does not mean that these principles are anytheless binding and effective. For that matter some of them receive greater protection today in England than they do in the United States. These basic principles are, I believe, four in number". (A. L. Goodhart, p. 55). Then he narrates what these four principles are: First that no man is above the law; the second, that those who govern Great Britain do so in a representative capacity and are subject to change but "an immortal Government tends to be an immoral Government"; the third, freedom of speech or thought and assembly are essential part of any Constitution which provides that people govern themselves because without them self-government becomes impossible; and the fourth, which is a basic part of the English Constitution is the independence of the judiciary and it is inconceivable that Parliament should regard itself as free to abolish the principle which has been accepted as a corner-stone of freedom ever since the Act of Settlement in 1701. Professor Goodhart then concludes:

> "It is therefore, I believe, true to say that it is as wrong in theory as it is in fact to suggest that the British Constitution is a form of enlightened despotism. Those who exercise power in the name of the State are bound by the law, and there are certain definite principles which limit the exercise of the power."

1121. Before considering the detailed contentions it is necessary to see what was intended to be achieved by the Twenty-fourth Amendment. I have already set out the changes made in Article 368. These are—

(*a*) In the marginal note, instead of the expression "Procedure for amendment of the Constitution", it was substituted by "Power of Parliament to amend the Constitution and procedure therefor". This was to meet any possible doubt that the marginal note only indicated a procedure and not the power of amendment, though the majority in *Golaknath's case* (supra), had held that Article 368 contains both power and procedure;

(*b*) By the addition of clause (1), three changes were effected, namely,

(*i*) a *non obstante* clause "Notwithstanding anything in this Constitution",

(*ii*) "Parliament may in exercise of its constituent power"; and

(*iii*) "amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in this article".

It has already been seen that both in *Sankari Prasad's and Sajjan Singh's cases* (supra), the two Houses of Parliament have been construed as Parliament and not a different body. In *Golaknath's case* (supra), also all the Judges held that it is only Parliament which makes the amendment. The question whether the power in Article 368 is a constituent power or a legislative power has of course been debated. The law in its generic terms includes a constituent law, namely, the Constitution itself made by a Constituent Assembly as indicated by the words "The Constitution as by law established", or an amendment made in accordance with the provision contained in the Constitution, as well as an ordinary legislative law made by the legislative organs created by the organic instrument. The quality and the nature of the law has been differently described, but broadly speaking the Constitution or the amendments thereof are termed as a law which is made in exercise of its constituent power, though the reach of each may differ. If it is true, as is contended, that both these in the plenitude of power are co-extensive, on any view of the matter, no difficulty is encountered in describing the amending power as the constituent power. Even otherwise without resort to any great subtlety or distinction between the exercise of power by a constituent body and a constituted body inasmuch as both are concerned in the making of the Constitution or in amending it, they can be considered as a constituent power. The amending power is a facet of the constituent power, but not the whole of it. The power under Article 368 after the amendment is still described as amending power. The Twenty-fourth Amendment makes this explicit because it did not want a doubt to linger that because the same body, namely, Parliament makes both the ordinary law in terms of the grant in Articles 245 to 248 and an amendment in terms of Article 368, it should not be considered that both these are legislative laws within the meaning of Article 13(2) which was what the majority in *Golaknath's case* (supra), has held. In the view I have taken that Article 13(2) was confined only to the ordinary legislative laws and not one made under Article 368, the addition of clause (1) to Article 368 in so far as it declares that when Parliament exercises the power under that provision it exercises its constituent power and makes explicit what was implicit. In my view, the amendment, therefore, makes no change in the position which prevailed before the amendment.

1122. It has also been seen that the amendment added clause (3) to Article 368 that "Nothing in Article 13 shall apply to any amendment made under this article", and has added clause (4) to Article 13 that "Nothing in this article shall apply to any amendment of this Constitution made under Article 368". These additions, having regard to the view I have taken that Article 13(2) does not impose any express limitation on Article 368, unless, of course, there is a limitation in Article 368 itself on the width of the power which the word 'amendment' in the context of that article and the other provisions of the Constitution might indicate, again make explicit what was implicit therein.

1123. The outstanding question then is, what is the meaning of the word 'amendment'—whether it has wide or a restricted meaning, whether the word 'amendment' includes repeal or revision, and whether having regard to the other provisions of the Constitution or the context of the word 'amendment' in Article 368 itself it has a restricted meaning, and consequently does not confer a power to damage or destroy the essential features of the Constitution.

1124. The existence or non-existence of any implied limitations on the amending power in a written Constitution which does not contain any express limitations on that power has been hotly debated before us for days. I have earlier set out some of these contentions. If the word 'amendment' has the restricted meaning, has that power been enlarged by the use of the words "amend by way of addition, variation or repeal" or do they mean the same as amendment? If they are wider than amendment, could Parliament in exercise of its amending power in Article 368 enlarge that power? This aspect has been seriously contested and cannot on a superficial view be brushed aside as not worthy of merit. There can be two ways of looking at it. One approach can be, and it would be the simplest solution to the problem that confronts us, to assume that the amending power is omni-sovereign and thereafter the task will be easy because so much has been written by academic writers that it will not be difficult to find expression of views which support that conclusion. Long years ago, Oliver Wendell Holmes had written, "you can give any concluison a logical form'' and one can only say how true it is. This course, however, should be eschewed, firstly, because of the *a priori* assumption and the speculation inherent in drawing upon such writings, and secondly, because the interpretation placed by these learned writers on Constitutions which are different will, if drawn upon, in effect allow them to interpret our Constitution, which though derivative it may be, has to be interpreted on the strength of its provisions and the ethos it postulates. It is, therefore, necessary to ascertain from the background of our national aspirations, the objectives adopted by the Constituent Assembly as translated into a working organic instrument which established a sovereign democratic Republic with a Parliamentary system of Government whereunder individual rights of citizens, the duties towards the community which the State was enjoined to discharge; the difusion of legislative power between Parliament and State Legislatures and the provision for its amendment, etc., are provided for. All these aspects were sought to be well balanced as in a ship built for fair weather as well as for foul. This then will be the proper approach.

1125. The Attorney-General contends that the word 'amendment' has a clear, precise, definite and unambiguous legal meaning and has been so used in all the written Constitutions of other countries also ever since written Constitutions have been innovated. The word 'amendment' according to him has received a well accepted construction which gives it the widest amplitude unrestricted by any limitations thereon. While making this submission, however, he has pointed out that though our Constituion has used different expressions at several places, it does not follow that they do not necessarily mean the same thing. The Advocate for the petitioner on the other hand says that this word has no precise and definite or primary and fundamental meaning and hence the cases on construction cited by the respondents that the Court is not concerned with the policy of the Legislature are not applicable. On the contrary, he points out, that since the word is ambiguous, the width of the power has to be ascertained by courts from the general scheme and context of the Constitution in which it appears and other relevant indications and principles. He relied on the observations of Lord Wright in *James* v. *Commonwealth of Australia*,[20] cited on behalf of the first respondent that, "A good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. 'Free' in itself is vague and indeterminate. It must take its colour from the context".

1126. The learned Attorney-General further submits, relying again on the decisions of the American Courts that revision and amendment have been held as synonymous terms and that if you give the power to amend the amending power, the amending power will become very wide. It is also his contention, relying on Strong on "*Modern Political Constitution*" that the amending provisions re-create the Constituent Assembly, provide some elements to be unaltered, and since our Constitution-makers who were aware of this position in the United States have used the same words, they must be intended to use that word as giving the widest power, and since there are no express limitations, no restriction on that power can be read into it by implication. A reference to the provision relating to amendment either in the United States or in the States' Constitutions where people have a vital part in the amending process is in my view inapt and inapplicable to the interpretation of our Constitution where the people have been designedly excluded. I say this, because we have been referred to the attempts made in the Constituent Assembly to involve people of this country in the amendment of the Constitution, but such attempts did not succeed. Brajeshwar Prasad had actually proposed an amendment to make the amending provision similar to the one in Australia Constitution and had said, "What is possible in Australia is possible here. If the people in Australia are competent and advanced to adopt this method of amendment, certainly we, who are as competent as the Australians, if not more, are entitled to adopt the same. I do not want to associate the State Legislatures in the process of amending the Constitution". He also said that, "If you want to abolish landlordism, you cannot afford to look for the consent of the landlords, and similarly, "if you want to abolish capitalism, you cannot afford to look for the consent of the capitalists". (*C. A. D.*, Vol. IX, p. 1646). This amendment, however, was negatived. (*C. A. D.*, Vol. IX, p. 1665).

* * * * *

1127. A reference was also made in this connection to draft Article 305 as indicating that the word 'amendment' would mean repeal or whittling down. Even assuming that that Article had been incorporated in the Constitution, what does the word 'amendment' in that context imply? First, draft Article 305 starts with the *non-obstante* clause, "Notwithstanding anything contained in Article 304" (present Article 368), and, secondly, the provisions relating to the reservation of seats for the minorities "shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution". This clause instead of throwing any light on the width of the power of amendment shows that it is completely restricted in that nothing can be done to affect that provision for ten years which limitation with the *non-obstante* clause excludes Article 304 altogether during that period. If after that period it is to be extended that Article can be amended but this does not mean that it can be repealed, for it is only concerned with either extension of the period or change in the terms or conditions under which the reservation would continue to apply.

---

[20] 1936 AC 578 at p. 627 (PC).

1128. It was contended that the word 'amendment' in Article 368 must be construed as meaning change for the better, improvement, etc. In *Golaknath's case* (supra) a similar contention was rejected by some of the learned Judges. Subba Rao, C. J., (speaking for 5 Judges) did not express any view though he said that the argument that Parliament cannot destroy the structure of the Constitution but it can modify the provisions thereof within the framework of the original instrument for its better effectuation, has considerable force, but they were relieved of the necessity to express their opinion as the question raised can be answered on a narrower basis. He observed that: "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard" (pp. 804-805).

1129. Hidayatullah, J., at p. 862 said:

> "I do not take the narrow view of the word 'amendment' as including only minor changes within the general framework. By an amendment new matter may be added, old matter removed or altered."

Wanchoo, J., (speaking for himself and two other Judges), observed at p. 834:

> "To say that 'amendment' in law only means a change which results in improvement would make amendments impossible, for what is improvement of an existing law is a matter of opinion and what, for example, the legislature may consider an improvement may not be so considered by others. It is, therefore, in our opinion impossible to introduce in the concept of amendment as used in Article 368 any idea of improvement as to details of the Constitution. The word 'amendment' used in Article 368 must, therefore, be given its full meaning as used in law and that means that by amendment an existing Constitution or law can be changed, and this change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether."

After noting that the word "amend" in the VI Schedule, Paragraph 21, where it was preceded by words "by way of addition, variance or repeal" and more or less similar expressions in other Articles of the Constitution, he observed, "it is very difficult to say why this was done. But the fact that no such words appear in Article 368 does not in our mind make any difference, for the meaning of the word 'amendment' in law is clearly as indicated above by us and the presence or absence of explanatory words of the nature indicated above do not in our opinion, make any difference". Bachawat, J., at pp. 915/916, says:

> "Article 368 indicates that the term 'amend' means 'change'. The proviso is expressed to apply to amendments which seek to make any 'change' in certain articles. The main part of Article 368 thus gives the power to amend or to make changes in the Constitution. A change is not necessarily an improvement. Normally the change is made with the object of making an improvement, but the experiment may fail to achieve the purpose. Even the plain dictionary meaning of the word 'amend' does not support the contention that an amendment must take

> an improvement, see *Oxford English Dictionary,* where the word 'amend' is defined thus: '4. To make professed improvements (in a measure before Parliament) formally to alter in detail, though practically it may be to alter its principle so as to thwart it'. The 1st, 4th, 16th and 17th Amendment Acts made changes in Part III of the Constitution. All the changes are authorised by Article 368".

Ramaswami, J., has not specifically dealt with the meaning of the word 'amendment'.

1130. It is obvious from these observations that the attempt to restrict the meaning of the word 'amendment' to 'improvement' has been rejected by five of the learned Judges in *Golaknath case* (supra).

1131. The learned Attorney-General, however, in the written summary of his arguments, said: "The majority of the learned Judges in *Golaknath case* (supra) rejected the arguments that the expression amendment of a Constitution has a narrow meaning. Thus the petitioner seeks to have the majority judgment overruled on this point". (Page 30, Para 9). This statement does not seem to be accurate, unless he has linked the rejection of the argument regarding the existence of implied limitations as recognising that the word amendment has a wide meaning. That implied limitations and the widh of the meaning of the word amendment were two different concepts admits of no doubt, because the former flows from the implications of the provisions of the Constitution whether general or specific, while the latter deals with scope and the ambit of the word amendment itself. If the power is wide, even implied limitations can also be abrogated, but it has nothing to do with the existence of the implied limitations. On the other hand, Hidayatullah, J. though he dealt with the narrowness or otherwise of the meaning of the word 'amendment', did not deal with the existence or non-existence of implied limitations under our Constitution. Bachawat, J., at pp. 915 and 916, also did not think it necessary to pronounce on implied limitations and like Wanchoo, J., has separately considered these two concepts (see pages 833-834, 835-836). These instances illustrate what I have said above. Even on this basis there would not be a majority of Judges who have held that there are no implied limitations.

1132. The learned Advocate-General for Maharashtra submits that when a person proposes an amendment and he is asked whether it is intended to be an improvement, the answer will always be 'Yes', because, he cannot very well say that it was not intended to be an improvement; that the meaning of the word 'amendment' in several Dictionaries which relate the word 'amendment' with 'improvement' is euphemistic. This is the reason why the word 'amendment' according to him is used in the earlier sense in common parlance, in public speeches, text-books or articles by learned writers, which is far from saying that an amendment must be only a change for effecting an improvement.

1133. Bachawat, J., earlier at p. 915 in *Golaknath case* (supra) referred to the decision *Livermore* v. *E. C. Waite*,[21] in support of the submission that an amendment must be an improvement of the Constitution. The following observations in *Livermore's case* (supra) were cited by him:

> "On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instru-

---

[21] 102 Cal 113-25 LRA 312.

> ment as will effect an improvement, or better carry out the purpose for which it was framed".

With respect to this passage, Bachawat, J., observed:

> "Now an attack on the eighteenth amendment of the U. S. Constitution based on this passage was brushed aside by the U. S. Supreme Court in the decision in the *National Prohibition case* (*Rhode Island* v. *Palmer*), 253 US 350; 64 L Ed 947, 960, 978). The decision totally negatived the contention that "an amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government nor relinquish in the State those which already have been granted to it" (See *Cooley on Constitutional Law*, Chapter III, Article V, pp. 46 and 47).

I find from the reference to the *National Prohibition case*, and the pages of that report given by Bachawat, J., namely: 64 L Ed 947, 960 and 978, that no observations to that effect have been made at page 978 by Mr. Justice Van Devanter. In that case the Supreme Court was considering an appeal from a District Court which had rejected the contention that 18th Amendment was not valid on the ground that, "The definition of the word 'amendment' include additions as well as corrections of matters already treated and there is nothing in its immediate context (Article V) which suggests that it was used in a restricted sense". The decree of the Court below was affirmed in the *National Prohibition case* (*Rhode Island* v. *Palmer*)[22] at p. 960 the briefs filed by the Attorney-General of Rhode Island and others did, however, refer to the passage cited by Bachawat, J., in *Livermore* v. *Waite* (supra). But none of the Judges in the *National Prohibition case* (supra), either referred to the passage in *Livermore's case* (supra) nor did they deal with the scope of the power of amendment and, therefore, it cannot either be said that the submission was brushed aside, nor can it be said that the *National Prohibition case* (supra) totally negatived that contention. It may be the opinion of Cooley in his book on "*Constitutional Law*" that the passage in *Livermore's case* (supra) cited by Bachawat, J., did not support the proposition therein stated. But all arguments in that case against the amendment could not be taken to be negatived, if they were not necessary for the decision. What arguments were brushed aside, no one can say with any amount of definiteness. If the judgment of the Supreme Court in *National Prohibition case* (supra) is read with the judgment of the District Court whose decree was affirmed, it may be taken to bave laid down that the word amendment would include addition of a provision to the Constitution and beyond this nothing more can be inferred from this judgment.

1134. The argument of the Advocate-General is that the words "amendment of this Constitution" in sub-para (2) of Para 7 and sub-para (2) of Para 21 of the respective Schedules refers to the words used in sub-para (1) of sub-paras (7) and (21) of the Schedules, and, therefore, the words "amendment of this Constitution" must be read to mean that it is an amendment by way of addition, variation or repeal. It was noticed that in *Golaknath case* (supra) while Wanchoo, J., could not fathom the reason why the expression 'by way of addition, variation or repeal' was used in Schedule V. Part 7 and Schedule VI, Para 21, he nonetheless thought the presence or absence of the explanatory words made no difference to the meaning of the word 'amendment'. In other words, according to the learned Advocate-General, the word 'amendment' in Article 368 is synonymous with the expression 'amend by way of addition, variation or repeal' so that the Twenty-Fourth Amendment according to this view, and probably to conform with it, used the clarificatory words and means even after this amendment the same meaning as the word 'amendment' had before Article 368 was amended. What an amendment can do has also been stated, by Wanchoo, J., namely, that the existing Constitution can be changed and this change can take the form either of addition to the existing provisions or alteration of the existing provisions and their substitution by others or deletion of certain provisions altogether. Though all this can be done, he said, it may be open to doubt whether the power of amendment contained in Article 368 goes to the extent of completely abrogating the present Constitution and substituting it by an entirely new one. (p. 834).

---

[22] 64 L Ed 946.

1135. It is also not disputed by the learned Attorney-General, the Solicitor-General, and the Advocate-General for Maharashtra that an amendment of the Constitution does not extend to abrogation of the Constitution, and on the contention of the Advocate-General, abrogation means repeal, both words being synonymous, and that the Constitution cannot be substituted by a new Constitution.

1136. In further explaining his submissions the Attorney-General said that the amending power in Article 368 as it stood before the Twenty-Fourth amendment and as it stands now has always been and continues to be, a constituent power, that is to say, the power to de-constitute or re-constitute the Constitution or any part of it. Such power extends to the addition to or variation of any part of the Constitution. But the amending power does not mean that the Constitution at any point of time would be so amended by way of addition, variation or repeal as to leave a vacuum in the governance of the country. According to him that is the whole object and necessity of the amending power in a Constitution so that the Constitution continues, and a constituent power, unless it is expressly limited in the Constitution itself, can by its very nature have no limits, because if any such limit is assumed although not expressed in the Constitution, the whole object and purpose of the amending power will be nullified.

1137. If amendment does not mean abrogation or repeal as submitted in the note of the Advocate-General, dated February 23, 1973, in which he said, "that repeal and abrogation mean the same thing since 'repeal' has 'abrogation' as one of its meaning and 'abrogation' has 'repeal' as one of its meanings", a question arises, where is the line to be drawn?

1138. The learned Attorney-General said that Article 368, clause (*e*) of the proviso by giving a power to amend the amending power, has conferred a wider power of amendment but that does not imply that the power of amendment had a limited meaning in the unamended article; that the word 'amendment' has only one meaning and it is a wide power and in Article 368 there is a recreation of the Constituent Assembly. If this submission is correct, how can it not extend to abrogation of the Constitution or substituting it by another?

1139. To this question the answer of the Attorney-General was that clause (*e*) of the proviso was added by way of abundant caution to meet a similar criticism which was directed against Article V of the U. S. Constitution. According to Advocate-General for Maharashtra, clause (*e*) of the proviso was inserted to meet the assumption of Chief Justice in the *Irish case* (supra) of the *State* (*Ryan and Others*) v. *Lennon and Others*,[23] that if amending provision could have been amended, then no limitation can be read. The Hon'ble Chief Justice has dealt with this aspect in full and I do not, therefore, propose to refer to it except to say that the analogy is inapplicable to the interpretation of Article 368.

---

[23] 1935 Irish Reports 170.

1140. Apart from the power of amendment not extending to the abrogation of the Constitution, it will appear on the submission of respondents, the Union of India and the State of Kerala, that the office of the President cannot be abolished without the concurrence of at least half the States even though Articles 52 and 53 are not included in the proviso to Article 368. The very fact that Article 54 and Article 55 are included in the proviso, it would, according to the Solicitor-General imply that the office of the President cannot be abolished without the concurrence of the States. Wanchoo, J., in *Golaknath's case* (supra) dealt with a similar contention at p. 844. Though he thought that the supposition was impossible, and I entirely agree with him that it is not likely, yet in such a case, "It would be right to hold that Article 52 could not be altered by Parliament to abolish the office of President.................it will require ratification". Nor do I think having regard to the basic structure of the Constitution is it possible to abolish the office of the President by resort to Article 368 and as assent is necessary, no President true to his oath to protect and defend the Constitution, will efface himself. It would, therefore, appear from this specific instance that an implied limitation is read into Article 368 by reason of the proviso entrenching Article 54. The learned Advocate-General says even Article 53 which vests the executive power of the Union in the President by sub-clause (2), vests the Supreme Command of the Defence Forces of the Union in the President, would also necessitate an amendment similar to Article 52 by ratification by the states. Yet another instance is, that an implied power to amend is found in Article 368. When the form and manner is complied with, the Constitution stands amended, from which provision as well as the fact that Article 368 is in a separate Part entitled 'amendment of the Constitution', the above conclusion was reached. The petitioner's counsel naturally asks that if *The Queen* v. *Burah*,[24] is read as an authority as contended on behalf of Kerala State against the existence of powers which are not conferred by affirmative words and against the existence of limitations, this proposition clearly negatives the respondents' other submission that the source of the amending power must impliedly found in Article 368 although such a power is not to be found affirmatively conferred.

1141. Though there are naturally some limitations to be found in every organic instrument, as there are bound to be limitations in any institution or any *other set up* brought into existence by human agencies, and though my Lord the Chief Justice has gone into this aspect fully, it is in my view not necessary to consider in this case the question of the existence or non-existence of implied or inherent limitations, because if the amending power is wide and plenary, those limitations can be overridden as indeed the *non-obstante* clause in the amended clause (1) of Article 368 was intended to subserve that end. What has to be considered is whether the word 'amendment' is wide enough to confer a plenitude of power including the power to repeal or abrogate.

1142. The Advocate-General has further submitted that there is intrinsic evidence in the Constitution itself that the word 'amendment' in Article 368 means 'amend by way of addition, variation or repeal', because if that were not so, sub-para (2) of Para 7 of Schedule V would not have taken out the law made under sub-para (1) empowering Parliament to "amend by way of addition, variation or repeal" any of the provisions of the Schedule from the operation of Article 368. The same meaning should also be given to Para 21 of Schedule VI. The learned Attorney-General has referred to several articles in which the word 'amendment' has been used, as also to several others in which that word or its variation has been used in continuation with other words. But these expressions do not show that the word 'amendment' is narrow or limited. In every case where an amendment has been made in the Constitution, he says, something has been added, something substituted, something repealed and re-enacted and certain parts omitted. The Constitution (First Amendment) Act is given as an instance of this, nor according to him does anything turn on the fact that Section 291 of the Government of India Act, 1935, was amended just about a few weeks before Article 368 was finalised, and in which the word 'amendment' was substituted for the words 'amend by way of addition, variation or repeal'. According to him what this Court must consider is that since Article 368 arranges to recreate the Constituent Assembly and exercise the same power as the Constituent Assembly, it should be read in a wide sense.

---

[24] 1877-78 JC 179.

1143. If the power of amendment is limitless and Parliament can do all that the petitioners contend it can do under Article 368, the respondents say it should not be assumed that power will be abused, but on the other hand the presumption is that it will be exercised wisely and reasonably, and the only assurance against any abuse is the restraint exercised by the people on the legislative organs. But the recognition of the truism that power corrupts and absolute power corrupts absolutely has been the wisdom that made practical men of experience in not only drawing up a written Constitution limiting powers of the legislative organs but in *securing* to all citizens certain basic rights against the State. If the faith in the rulers is so great and faith in the people to curb excessive exercise of power or abuse of it is so potent, then one needs no eleborate Constitution, because all that is required is to make Parliament omni-potent and omnisovereign. But this the framers did not do and hence the question will be whether by an amendment under Article 368, can Parliament effect a metamorphosis of power of making itself the supreme sovereign. I do not suppose that the framers were unaware of the examples which must be fresh in their minds that once power is wrested which does not legitimately belong to a limited Legislature, the efforts to dislodge it must only be by a painful process of struggle, bloodshed and attrition—what in common parlance would be a revolution. No one suggests this will be done, but no one should be complacent that this will not be possible, for if there is power it can achieve even a destructive end. It is against abuse of power that a constitutional structure of power relationship with checks and balances is devised and safeguards provided for whether expressly or by necessary implication. And the question is whether there are any such in our Constitution, and if so, whether they can be damaged or destroyed by an amending power?

1144. The petitioner's counsel, Advocate-General and the Attorney-General have furnished us with the extracts from various dictionaries, and the learned Attorney-General has further referred us to a large number of Constitutions in which the word 'amendment' or words used for amending the Constitution have been employed, to show that there is no difference or distinction between these words and the word 'amendment'. In all these Constitutions, subject to which I said of the inappropriateness of comparing other world Constitutions made for different people with their differing social, political and economic outlook, the words used are either 'amendment' or a combination of that word with others or a totally different word. In some of the Constitutions given in the compilations made available to us where the word 'amendment' alone is used, the exercise of the power of amendment was inextricably linked with the ratification by the people in whom the sovereignty rests, either by referendum or by convention or by the Legislatures. The Constitutions of other countries which have been referred to specifically by the learned Attorney-General are of Liberia, Trinidad and Tobago, Somalia, Jordan, Kuwait, Lebanon, Vietnam Democratic Republic, Belgium, Costa Rica, Cuba and Nicaragua. I have examined the relevant provisions of these Constitutions regarding the amendatory process. These Constitutions have used different words than the words used in our Constitution. When the word 'amendment' or 'amend' is used, it has been invariably used with the words 'alter' or 'repeal', or 'revise' or 'variation, addition or repeal' or 'modification' or 'suspension', or 'addition' or 'deleting' or 'partially amend' or 'general amendment' or 'specific, partial or complete', or 'wholly or partially amend' or by a combination of one or more of these expressions. In one of the Constitutions, namely, Trinidad and Tobago, the word 'alteration' was defined to include 'amendment, modifictaion or modification or that provision, the suspension or repeal of that provision and the making of a different provision in lieu of the provision'.

1145. In some of the other Constitutions not referred to by the Attorney-General where the amending process is not referable to the voters by referendum or to be ratified in a convention with the word 'amend', the words 'alter', 'add', 'supplement', 'repeal' or similar words have been used to indicate the plenitude of power of amendment. Section 29(4) of the Ceylon Constitutional Order, 1946, which was the subject-matter of decisions in *Liyanage* v. *The Queen*[25] and *The Bribery Commissioner* v. *Ranasinghe*[26] cases, and had been debated in this Court by counsel on either side, provides that in the exercise of its powers under the section "Parliament may *amend* or *repeal*, any of the provisions of this Order, or of any other Order". But this sub-section entranches by sub-section (2) certain matters from being amended because as the Privy Council observed that "They represented a solemn balance of rights between the citizens of Ceylon". In the Constitution of Finland the words used are *adoption*, *amendment* or *abrogation* of a fundamental law. The Irish Constitution, 1937, provided by Article 46(1) that any provision of the Constitution may be amended, whether by way of *variation*, *addition*, or *repeal* in the manner provided by the Article, and the Constitution of Malaya has defined the word in clause (6) of Article 159 that 'amendment' includes *addition* and *repeal*. Even the Constitution of the Islamic Republic of Pakistan has used the words *amended* or *repealed*. The Constitution of the Union of South Africa has used the words repeal or alter and the Constitution of the United States of Brazil has an entrenched provision in clause (6) of Article 217 that the Bills tending to abolish the Federation and the Republic shall not be admitted to consideration.

1146. These references not only do not show that the word 'amendment' has been used by itself to denote the plenitude of power but on the other hand show that these prescribe a procedure in which the people have been associated or a Constituent Assembly has to be called or fresh elections are required to be held to consider the amendments. In some of these Constitutions there was also a difference made between total and partial amendments and where the word 'alteration' has been used, it has been defined as to what is included therein. No assistance can, therefore, be derived from the

---

[25] (1967) 1 AC 259.

[26] (1964) 2 WLR 1301.

Constitutions either referred to by the Attorney-General or by the ones to which I have referred, and if at all, they only show that the word 'amendment' has not, as contended, unambiguous, precise or wide connotation.

1147. It is said that the words "amend by way of addition, variation or repeal" by reference to clause (2) of Para 7 and Para 21 of the Fifth and Sixth Schedule respectively, mean the same as amendment, and consequently Article 368 empowers the repeal of any provision of the Constitution. If the word "repeal" means abrogation, then an amendment under Article 368 can even abrogate any provision of the Constitution, short of abrogating the entire Constitution and substituting a new one. In my view, the phrase "by way of" call it a padding, call it explanatory, is idiomatic and difficult to render into exact phraseology. An idiom is an accepted phrase, construction or expression contrary to the usual pattern of the language or having a meaning different from the literal. As the *Words and Phrases—Permanent Edition*, Vol. 5, p. 1111, would show that "by way of" may be taken to mean "as for the purpose of", "in character of", "as being" and was so intended to be construed in an Act providing that certain companies should pay an annual tax for the use of the State, "by way of" a licence for their corporate franchise. The illustration given should show that in fact the payment of a licence fee is not a tax, but it is so considered to be by way of tax. In my view, therefore, the substitution of the word "amendment" by the expression "amend by way of addition, variation or repeal" makes no difference as it bears the same meaning as the word "Amendment".

1148. In its ordinary meaning the word "amend" as given in *Shorter Oxford Dictionary* is to make alterations. In some of the Dictionaries it is given as meaning "to alter, modify, rephrase, or add to or substract from". *Judicial and Statutory Definitions of Words and Phrases*, Second Series, Vol. I—the word "amend" has been treated as synonymous with correct, reform, and rectify. It is also stated that "amendment" of a statute implies its survival and not destruction. The word "amend" in legal phraseology, does not generally mean the same thing as "repeal", because there is a distinction between a "repeal" but it does not follow that "amendments of statute may not often be accomplished by repeals of some of its parts" and though "amendment may not directly amount to repeal, it may have such a consequential effect". Crawford in his book on "*The Construction of Statutes*", 1940, pp. 171-171 which is quite often referred to and used in this Court, states that "a law is amended when it is in whole or in part permitted to remain and something is added to, or taken from it, or it is in some way changed or altered in order to make it more complete, or perfect, or effective. It should be noticed, however, that an amendment is not the same as a repeal, although it may operate as a repeal to a certain degree. A repeal is the abrogation or destruction of a law by a Legislative Act. Hence we may see that it is the effect of the Legislative Act which determines its character". The first part of this definition may be compared with the meaning indicated by Wanchoo, J., *Golaknath case* (supra) at p. 833 to which a reference has already been made.

1149. Both the learned Advocate for the petitioner and the Attorney-General have referred to the decisions of the State Courts of the United States for the meaning of the word 'amend' in support of their respective contentions, but these decisions which are rendered in the context of the Constitutions of the the respective States in Amercia where ratification by the people is a condition for amending the Constitution do not carry the matter any further. Even in these cases the word 'amendment' has been used in contradistinction with the word 'revision'. *Words and Phrases—Permanent Edition*, Vol. 37 says: "The term 'repeal' is synonymous with abolish, rescind and annul. An amendment has been distinguished from alteration or change. It is said that an amendment keeps alive while a 'repeal' destroys". See *State ex. rel. Strut* v. *Baker.*[27] It is, therefore, apparent from the meaning of the word 'amendment' that it does not include 'repeal' or 'abrogation' nor is it the same as revision.

1149-A. I would now refer to certain provisions of the Constitution where the words "amend" or "repeal" have been used to indicate that the ambit of the power of amendment does not extent to repeal, A repeal of a provision of a law is difference from the repeal of the law itself. The Constitution itself has made a distinction between the amendment of the law and repeal of the law. This becomes clear if we refer to Article 372(2) in which power has been given to the President by order to make such adaptations and modifications of any law whether by way of repeal or amendment, as may be necessary or expedient, to bring it in conformity with the provisions of the Constitution. See also Article 372(2)(*b*). Clause (2) of Article 252 provides that any Act passed by Parliament in respect of two or more States may be amended, or repealed by an act of Parliament. In this clause the word 'repeal' is used in contradistinction to 'amendment' as clearly implying that amendment does not include repeal of the Act itself. Even in Article 372 (1), this distinction is brought out where a law in force immediately before the commencement of the Constitution was to continue in force until "altered or repealed or amended" by a competent authority. Similarly in Article 35 (*b*) also any law in force immediately before the commencement of the Constitution in the territory with respect to any of the matters specified therein and to any adaptations and modifications that may be made therein under Article 372 continue in force until "altered or repealed or amended" by Parliament. See proviso to clause (2) of Article 254 and clause (5) of Article 350. It may also be noticed that before the repeal of Article 243, clause (2) thereof provided that the President may make regulations for the peace and good government of territories in Part D of the First Schedule and any regulation so made may repeal or amend any law made by Parliament or any existing law, it will, therefore, be observed that even where power has been given to a competent Legislature or any other competent authority over a law in force to continue by virtue of the above referred provisions, the framers have used the word 'repeal' of a law in contradistinction to the word 'amend' of a law. It may be contended with some force that where the framers intended to give full and plenary powers to competent Legislatures to deal with laws in force, they were meticulous enough to use two distinct words. If the word 'amend' or 'amendment' in its generic connotation meant 'repeal', then this word would not have been used in contradistinction with the word amendment or amend in some articles, and only the word 'amend' or 'amendment' in others. In so far as the laws in force are concerned, it would appear that the intention was not to add to them, though the word 'alter' could imply also a variation. Nonetheless it is apparent that the word 'amendment' as used in Article 368 does not connote a plenitude of power. This is also clear from sub-section (2) of Section 6 of the Indian Independence Act, 1947 which, as already seen, even in the context of the power to be possessed by the Constituent Assembly, uses the word 'repeal' or 'amend' to indicate the plenitude of the power of abrogation and repeal. Sections 32, 37, 74, 82 and 107(2) of the Government of India Act also use the word

---

[27] 299 NW 574, ND 153.

'amendment' in the sense of change and not repeal of the law. On the other hand, Section 106(2) of Government of India Act and Article 372(1) use the word 'repeal'. In the former, power is given to repeal a law, and in the latter it was provided that notwithstanding the repeal of enactments referred to in Article 395 to which included the Indian Independence Act, etc., all the laws in force and also be replaced in the sense that they could be abrogated. Further in clauses (3) and (4) of Article 109, the Council of State is empowered to make amendments in money bill which the House of the People may or may not accept and if it does not, it will be passed without any such amendment. The Council of States, cannot reject the bill altogether but can only make a change therein.

1150. The argument that if wide construction is given to the word 'amendment' all fundamental rights can be taken away by the requisite majority, whereas much less significant matters require the concurrence, of not less than one-half of the States under the proviso is based on the misconception that unlike in the United States where there is a dual citizenship—one as a citizen of United States and the other as a citizen of the particular State in the Union, we have only one citizenship and that is as a citizen of India and it is Parliament and Parliament alone which can legislate in respect of that right. No State has the legislative power to affect that right, and, therefore, have not been given a power of ratification where the fundamental rights are sought to be amended under Article 368. This aspect is not, however, determinative of the extent of the power of amendment under Article 368. The word 'amendment', read with the other provisions indicates that it is used in the sense of empowering a change in contradistinction to destruction which a repeal or abrogation would imply. Article 368 empowers only a change in the Constitution as is evident from the proviso which requires that where the provisions specified in clauses (*a*) to (*e*) have to be amended they have to be ratified by the resolution of not less than one-half of the Legislatures of the States. This proviso furnishes a key to the meaning of the word 'amendment' that they can be changed without destroying them just in the same way as the entire Constitution cannot be abrogated and new Constitution substituted therefor. In this view, I agree with my Lord the Chief Justice, for the reasons given by him, that the amplitude of the power of amendment in Article 368 cannot be enlarged by amending the amending power under proviso (*e*) to Article 368.

1151. What follows from this conclusion is the next question to be considered. It is submitted that an amendment should not alter the basic structure of the Constitution or be repugnant to the objectives set out in the Preamble and cannot be exercised to make the Constitution unidentifiable by altering its basic concept governing the democratic way of life accepted by the people of this country. If the entire Constitution cannot be abrogated, can all the provisions of the Constitution leaving the Preamble, or one article, or a few articles of the original Constitution be repealed and in their place other provisions replaced, whereby the entire structure of the Constitution, the power relationship *inter se* three Departments, the federal character of the State and the rights of the citizens *vis-a-vis* the State, are abrogated and new institutions, power relationships and the fundamental features substituted therefor? In my view, such an attempt would equally amount to abrogation of the Constitution, because any such exercise of the power will merely leave the husk and will amount to the substitution of an entirely new Constitution, which it is not denied, cannot be done under Article 368.

1152. The Preamble to the Constitution which our founding fathers have, after the Constitution was framed, finally settled to confrom to the ideals and aspirations of the people embodied in that instrument, have in ringing tone declared the purposes and objectives which the Constitution was intended to subserve. How far the Preamble can be resorted to for interpreting the Constitution has been the subject of debate. It was contended that it is not a part of the Constitution, and as we have been shown, that this concept had found approval of this Court in *In re: Berubari Union & Exchange of Enclaves* (supra) but the Court did not appear to have noticed that it was adopted by the Constituent Assembly as part of the Constitution. The observations of Gajendragadkar, C. J., must be understood in the context of his assumption that the Preamble is not a part of the Constitution. After referring to Story that the Preamble is "a key to open the mind of the makers" and a passage from Willoughby that it has never been regarded as source of any substantive power, etc., the learned Chief Justice concluded thus: (p. 282).

> "What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the Preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory, if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble. Therefore, Mr. Chatterjee is not right in contending that the Preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty."

It may be pointed out that the passage from Story and Willoughby cited therein have not been fully extracted. For a proper appreciation of the views of these authors it is necessary to examine the relevant passages in full. Story says, "It is an admitted maxim..................that the Preamble of a statute is a key to open the mind of the makers as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.........................the will and intention of the Legislature is to be regarded and followed. It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the Preamble. There does not seem any reason why, in a fundamental law or constitution of Government, an equal attention should not be given to the intention of the framers, as stated in the Preamble..................The Preamble can never be resorted to, to enlarge the powers confided to the general Government, or any of its departments. It cannot confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution, and not substantively to create them..................We have the strongest assurances, that this Preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the Government". (Story, *Constitution of United States*, Vol. I, pp. 443-446).

1153. It is clear from the above views of Story that: (*a*) the Preamble is a key to open the mind of the makers as to the mischiefs, which are to be remedied; (*b*) that it is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; (*c*) even where the words are clear and unambiguous, it can be used to prevent an obvious absurdity or to a direct overthrow of the intention expressed in the Preamble, and it would be much more so, if they were ambiguous; (*d*) there is no reason why, in fundamental law or constitution of Government, an equal attention should not be given to the intention of the framers, as stated in the Preamble; (*e*) the Preamble can never be resorted to, to enlarge the powers expressly given, nor to substantively create any power or to imply a power which is otherwise withdrawn from the Constitution; (*f*) its true function is to expound the nature, extent, and application of the powers actually conferred by the Constitution.

1154. The passage extracted from Willoughby no doubt shows that Preamble may not be resorted to as a source of Federal Authority but in dealing with its value and use the learned author has stated thus:

> "Special significance has at various times been attached to several of the expressions employed in the Preamble to the Constituton. These expressions are—
>
> (1) The use of the phrase 'We, the People of the United States', as indicating the legislative source of the Constitution.
>
> (2) The denomination of the instrument as a 'Constitution'.
>
> (3) The description of the federation entered into as 'a more perfect Union'.
>
> (4) The enumeration of 'the common defence' and 'general welfare' among the objects which the new Government is established to promote" (Willoughby, Vol. I, p. 62).

These American authors, therefore, recognise the use of the Preamble to ascertain the essential concepts underlying the Constitution.

1155. The English cases show that the Preamble can be resorted to as a means to discover the legislative intent of which one may be cited. In the *Attorney-General* v. *Prince Earnest Augustus of Hanover*,[28] the House of Lords considered the question whether and to what extent Preamble of a statute can be relied upon to construe the enacting part of the statute. Viscount Simond (with whom Lord Tucker agreed), observed at p. 461: "For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its Preamble, the existing state of the law, other statutes in *pari materia*. and mischief which I can, by those and other legitimate means, discern *the statute was intended to remedy*". Referring to the observations in *Powell* v. *Kempton Park Racecourse Co. Ltd.*[29] that "the Preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms', Viscount Simond said at p. 463: "it is often difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the Preamble. It only means that the elementary rule must be observed that no one should profess to understand any part of the statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous... ..I would suggest that it is better stated by saying that the context of the Preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it. And I do not propose to define that expression except negatively by saying...that it is not to be found merely in the fact that the enacting words go further than the Preamble has indicated. Still less can the Preamble affect the meaning of the enacting words when its own meaning is in doubt."

---

[28] 1957 AC 436.

[29] 1899 AC 143.

1156. On this aspect Lord Normand said at pp.467-468 "when there is a Preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is, therefore, clearly permissible to have recourse to it as an aid to construing the enacting provision. The Preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts......It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the Preamble may legitimately prevail.........it is the court's business in any case of some difficulty, after informing itself of......the legal and factual context including the Preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward ....If they admit of only one construction, that construction will receive effect even if it is inconsistent with the Preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the Preamble may be preferred". Lord Sommervell said at p. 474, that, "The word 'unambiguous' must mean unambiguous in their context". Lord Thring, one of the great draftsmen of England in his book on "*Practical Legislation*", Chapter IV, pp. 92-93, made this pertinent observation as to Preambles. He said, "a preamble may also be used to limit the scope of certain expressions in the Act, and sometimes a preamble is inserted for political reasons when the object of an Act is popular, and admits of being stated in a telling sentence or sentences". In *Sajjan Singh's case* (supra) at p. 968, Mudholkar, J., while taking note of the contention that it has been said that the Preamble is not a part of the Constitution observed: "But, I think, that if upon a comparison of the Preamble with the broad features of the Constitution it would appear that the Preamble is an epitome of those features or, to put it differently, if these features are an amplification or concretisation of the concepts set out in the Preamble it may have to be considered whether the Preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the Preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?" With great respect, I agree with the view expressed by him.

1157. These observations of the House of Lords, of the learned writers and of the Judges referred to above clearly point to the fact that the Preamble will furnish a guide to the construction of the statute where the words are ambiguous or even whose the words are unambiguous to aid a construction which will not lead to an absurdity. Where the Preamble conveys a clear and definite meaning, it would prevail over the enacting words which are relatively obscure or indefinite or if the words are capable of more than one construction, the construction which fits the Preamble may be preferred.

1158. In *In Re*: *Berubari Union and Exchange of Enclaves case* (supra) the Court failed to refer to and consider the view of Story that the Preamble can be resorted to, to expound the nature, the extent and the application of the powers or that the Preamble can be resorted to, to prevent obvious absurdity or to a direct overthrow of the intention expressed therein. It may also be observed that the Court in that case did categorically say that the first part of the Preamble is not a serious limitation. If the Court had taken a definite view that the Preamble was not a source of limitation, the observation that, "it is not easy to accept the assumption that the first part of the Preamble postulates a *very serious limitation* on one of the very important attributes of sovereignty" (emphasis supplied) was not necessary, because it implies that certain parts of the Preamble can be established to be a source of serious limitation if such exists. In any case though the advisory opinion is entitled to the greatest respect, it is not binding when any concrete issue arises for determination, particularly when the width of the power of amendment had not fallen for consideration in that case, nor was it in fact considered at all.

1159. I will now consider the question which has been strenuously contended, namely, that there are no essential features, that every feature in the Constitution is essential, and if this were not so, the amending power under the Constitution will apply only to now essential features which it would be difficult to envisage was the only purpose of the framers in inscribing Article 368 and that, therefore, there is no warrant for such a concept to be read into the Constitution. The argument at first flush is attractive, but if we were to ask ourselves the question whether the Constitution has any structure or is structureless or is a "jelly fish" to use an epithet of the learned Advocate for the petitioner, the answer would resolve our doubt. If the Constitution is considered as a mechanism, or call it an organism or a piece of constitutional engineering, whichever it is, it must have a structure, or a composition or a base or foundation. What it is can only be ascertained, if we examine the provisions which the Hon'ble Chief Justice has done in great detail after which he has instanced the features which constitute the basic structure. I do not intend to cover the same field once again. There is nothing vague or unascertainable in the Preamble and if what is stated therein is subject to this criticism it would be equally true of what is stated in Article 39(*b*) and (*c*) as these are also objectives fundamental in the governance of the country which the State is enjoined to achieve for the amelioration and happiness of its people. The elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. Each one of these is important and collectively they assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements the structure will not survive and it will not be the same Constitution, or this Constitution, nor can it maintain its identity if something quite different is substituted in its place, which the sovereign will of the people alone can do. There can be a Democratic Republic in the sense that people may be given the right to vote for one party or only one candidate either affirmatively or negatively, and are not given the choice to choose another opposed to it or him. Such a republic is not what has been assured to our people and is unthinkable by any one foresworn to uphold, defend, protect or preserve or work the Constitution. A democratic republic that is envisaged is the one based on a representative system in which people holding opposing view to one another can be candidates and invite the electorate to vote for them. If this is the system which is the foundation of a democratic republic, it is unthinkable that it can exist without elements (2) to (4) above either collectively or separately. What is democracy without social, economic and political justice, or what value will it have, where its citizens have no liberty of thought, belief, faith or worship or where there is no equality of status and of opportunity? What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have been abrogated and made non-existent. The fact that a complete list of these essential elements constituting the basic structure are not enumerated, is no ground for denying that these exist. Are all the elements which make a law void and unconstitutional ever required to be concatenated for the recognition of the validity or invalidity of laws judged on the anvil of the Constitution? A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view constitute the basic structure. But do the fundamental rights in Part III and Directive Principles in Part IV constitute the essential elements of the basic structure of our Constitution in that the Constitution will be the Constitution without them? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot; without either fundamental rights or directive principles, what can such a government be if it does not ensure political, economic, or social justice?

1160. The history of the agitation for political freedom, fundamental rights and self-government is well known. As I said earlier, ever since the second half of the 19th century the struggle has been going on and when ultimately India in spite of the partition, achieved its cherished dream of independence and territorial unity from north to south, and east to west, which in millinneum it could not achieve, the fundamental objectives formed the corner stone of the nation. As Granville Austin so aptly puts it in his book "*The Indian Constitution*" at page 50, "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeations of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution. The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles thus connect India's future, present, and past, adding greatly to the significance of their inclusion in the Constitution, and giving strength to the pursuit of the social revolution in India."

1161. The demand for fundamental rights had its inspiration in the Magna Carta and the English Bill of Rights, the French Revolution, the American Bill of Rights incorporated in the Constitution of the United States in 1791. For the first time, the Indian National Congress which was formed in 1885, made a demand for them in the Constitution of India Bill, 1895 and these demands were reiterated from time to time. Annie Besant's Commonwealth of India Bill contained a demand for 7 fundamental rights. The Simon Commission rejected these demands for inclusion of fundamental rights, but Moti Lal Nehru Committee drafted a Swaraj Constitution for India incorporating therein the declaration of rights. In respect of these rights, the report said:

> "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances……………"

The Karachi Resolution of March, 1931, on Fundamental Rights on economic and social change added a new dimension to constitutional rights because till then State's negative obligations were alone being emphasised. By that Resolution "the demand now equally emphasised the State's positive obligations to provide its people with the economic and social conditions in which their negative rights would have actual meaning". (Granville Austin, p. 56). The Sapru Committee also incorporated these fundamental rights and for the first time divided them into justiciable and non-justiciable rights. During the Constituent Assembly Debates, Pt. Jawahar Lal Nehru in dealing with the confusion existing in the minds of the members in respect of the fundamental rights, said: "There is this confusion, this overlapping, and hence I think a great deal of difficulty has been brought into the picture. A fundamental rights should be looked upon, *not from the point of view of any particular difficulty of the moment,* but as something that you want *to make permanent in the Constitution.* The other matter should be looked upon—however important it might be—*not from this permanent and fundamental point of view,* but from the more temporary point of view". (emphasis supplied). Dr. Radhakrishnan described the declaration of basic freedoms as a "pledge to our own people and a pact with the civilised world". (*Constituent Assembly Debates,* Vol. II, p. 273). Dr. Ambedkar speaking on the Objectives Resolution, said that "when one reads that part of the Resolution, it reminds one of the declaration of the Rights of Man which was pronounced by the French Constituent Assembly. I think I am right in suggesting that, after the lapse of practically 450 years, the Declaration of the Rights of Man and the principles which are embodied in it has become *part and parcel of our mental make-up. I say they have become not only the part and parcel of the mental make-up of modern man in every civilised part of the world, but also in our own country which is so orthodox, or archaic in its thought and its social structure, hardly anyone can be found to deny its validity.* To repeat it now as the Resolution does, is to say the least, pure pedantry. These principles have become the *silent immaculate premise of our outlook.* It is therefore unnecessary to proclaim as forming a part of our creed. The Resolution suffers from certain other lacuna. I find that this part of the Resolution, although it enunciates certain rights, does not speak of remedies. All of us are aware of the fact that rights are nothing unless remedies are provided whereby people can seek to obtain redress when rights are invaded". The reference to the remedy that was absent in the Objectives Resolution, was made good by the inclusion of Article 32, with respect to which he said: "an article without which this Constitution *would be a nullity*………I could not refer to any other article except this one. *It is the very soul of the Constitution* and *the very heart of it* and I am glad that the House has realised its importance. ……………It is remedy that makes a right real. If there is no remedy there is no right at all……………" (emphasis supplied) (*Constituent Assembly Debates,* Vol. VII, p. 953). Although he said while dealing with appropriateness of the English high prerogative writs as affording an effective remedy that these could be amended he did not say that either the judicial review could be abrogated or taken away by an amendment or the Court itself can be abolished. Nor was any question raised by any one in this regard. Dr. Ambedkar's observations cannot be read to suggest that by an amendment of the Constitution, Article 32 could be abrogated, for if it were so, his observations could be in clear conflict with the express language of Clause 4 of Article 32. The guarantee in clause (4) of Article 32 could be conceived of only against amending power, for no ordinary law can suspend a right given by the Constitution unless permitted by the Constitution itself. When clause (4) of Article 32 does not even permit suspension of the right under Article 32 except as otherwise provided in the Constitution, that is, by Article 359, it is highly unthinkable that by an amendment this right could be abrogated. This pivotal feature of the Fundamental Rights demonstrates that this basic structure cannot be damaged or destroyed. When a remedy cannot be abrogated, it should follow that the fundamental rights cannot be abrogated for the reason that the existence of a remedy would be meaningless without the rights. There is nothing else in the debates which would suggest that any of the members ever entertained any notion of abrogation of any of the fundamental rights. It was in the light of the make-up of the members and the dedicated way in which they spoke of these rights that these rights were cherished by the people. It could not be imagined that any one would have suggested anything to the contrary. In respect of the Directive Principles, though every one recognised these as of great importance, Shri B. N. Rau made several attempts to persuade the Drafting Committee to make the fundamental rights subordinate to the Directive Principles but he did not succeed. Sir Alladi Krishnaswami Ayyar an eminent lawyer, had in his note of March 14, 1947, made a distinction between the Directive Principles and Fundamental Rights and said that it is impossible to equate those though it could not be denied that they were important. There can be no doubt that the object of the Fundamental Rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State Policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37, are fundamental in the governance of the country. As My Lord, the Chief Justice has put it, to say that the Directive Principles give a directive to take away fundamental rights, seems a contradiction in terms. There is no rationale in the argument that the Directive Principles can only be given effect to, if fundamental rights are abrogated. If that were the dissiderate then every Government that comes into power and which has to give effect to the Directive Principles of State policy in securing the welfare of its citizens, can say that since it cannot give effect to it so long as fundamental rights subsist, they must be abrogated. I do not think there is any such inherent postulate in the Constitution. Some of these rights, though limited, were subsisting from even the British days under the laws then in force, yet there were others which were repressive like the Bengal Regulation III of 1818, Madras Regulation II of 1819, Bombay Regulation XXV of 1827, the Indian Criminal Law Amendment Act XIV of 1908, etc., which were used to suppress the freedom of the people and detain persons on political grounds when they were found inconvenient to the rulers. The demand for securing fundamental rights since then became an Article of faith, which, as Dr. Ambedkar said, became part and parcel of the mental make-up and the silent immaculate premise of their outlook.

The outlook of the framers of the Constitution could not have provided for such a contingency where they can be abrogated, nor in any view, is it a necessary concommitant of the Jeffersonian theory that no one can bind the succeeding generations who by the will of the majority of the people of the country, can bind themselves. One of the views in America since then held and which still persists, was expressed by Justice Hugo Black, one of the eminent Judges of the Supreme Court in these terms: "I cannot consider the Bill of Rights to be an out-worn 18th century 'straight-jacket'. Its provisions may be thought out-dated abstractions by some. And it is true that they are designed to meet ancient evils. But they are the same against all human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of many". In 1895, the famous Jurist Maitland, even where Parliament was Supreme, said of Magna Charta that, "this document becomes and rightly becomes the sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had". [Pollock and Maitland, (1898), Volume I, p. 173.]

1162. In the frame of mind and with the recognition of the dominant; 'mental make-up and the silent immaculate premise of our outlook' which became the outlook of the people, the framers of our Constitution could not have provided for the freedoms inherent as a part of the right of civilised man to be abrogated or destroyed. The interest of the community and of the society will not be jeopardised and can be adjusted without abrogating, damaging, emasculating or destroying these rights in such a way as to amount to abrogation of the Fundamental Rights. The Advocate-General of Mysore said that even if fundamental rights are totally abrogated, it is not as if the people will be without any rights. They will be subject to ordinary rights under the law. I must repudiate this contention, because then the clock will be put back to the same position as existed when Britain ruled India and against which rule our leaders fought for establishing freedom, dignity and basic rights. In this view, my conclusion is that Article 13(2) inhibits only a law made by the ordinary legislative agency and not an amendment under Article 368; that Parliament could under Article 368 amend Article 13 and also the Fundamental rights, and though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity. Within these limits, Parliament can amend every article. In this view of the scope of the amending power in Article 368, I hold the Twenty-fourth Amendment valid, for it has the same amending power as it existed before the amendment.

1163. The Twenty-fifth Amendment, as the objects and reasons of the Bill showed, was enacted mainly to get over the decision in the case of *R. C. Cooper* v. *Union of India*,[30] [hereinafter referred to as the '*Bank Nationalisation case* (supra).] The previous decisions of this Court beginning from the *State of West Bengal* v. *Mrs. Bela Banerjee*,[31] on account of which the Constitution (Fourth Amendment) Act, 1955, was enacted and the subsequent cases in *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras and Another*,[32] *Union of India* v. *The Metal Corporation of India Ltd. and Another*,[33] *State of Gujarat* v. *Shantilal Mangaldas and Others*,[34] have been examined by my learned brother

---

[30] (1970) 3 SCR 530: (1970) 1 SCC 248.

[31] 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.

[32] (1965) 1 SCR 614: AIR 1965 SC 1017: (1964) 2 SCJ 703.

[33] (1967) 1 SCR 255: AIR 1967 SC 637: (1967) 1 SCJ 882: 37 Com Cas 1.

[34] (1969) 3 SCR 341: (1969) 1 SCC 509.

Hegde, J., in his judgment just pronounced, in the light of contentions urged by the respondents, as such I do not find it necessary to refer to them or set out the ratio of these decisions again.

1164. It will be observed from the amendment in clause (2) of Article 31 enacted by Section 2 of the above amendment that: (1) the word 'amount' has been substituted for the word 'compensation'; and (2) that the words "or that the whole or any part of such "amount is to be given otherwise than in cash" have been added. The effect of the amendment is that the law now need not provide for giving 'compensation' in the sense of equivalent in value or just equivalent of the value of the property acquired and that the whole or part of the amount may be paid otherwise than in cash. The question then arises that if the word "amount" which has no legal concept, and as the amended clause indicates, means only cash, which would be in the currency of the country, can the lowest amount of the current coin be fixed, and if fixed, will it amount to payment in lieu of the property acquired?

1165. Ever since the Constitution (Fourth Amendment) Act, this Court has consistently held that where what is given in lieu of expropriating property of a citizen is illusory, arbitrary, or cannot be regarded as compensation, and bears no reasonable relation to the property acquired, the Court can go into it, and, secondly, where principles are fixed for determining the compensation, it can examine the question whether they are relevant to the subject-matter of the acquisition. That position has not in any way been affected by the amendment by merely substituting the word 'amount' for 'compensation' so that if the amount is illusory or arbitrary, and is such that it shocks the conscience of any reasonable man, and bears no reasonable relation to the value of the property acquired, the Court is not precluded from examining it.

1166. It has been contended that Parliament or the Legislature can either fix an amount without setting out any principles, for determining the amount or set out the principles for determing the amount. In the former case, the respondents contend that it will not be open to the Court to examine on what principles the amount has been fixed. If the Legislature merely names an amount in the law for acquisition or requisition, it may be an arbitrary amount, or it may have some relationship or relevance to the value of the property acquired or requisitioned. The former cannot be, because it is provided that the acquisition is for an amount which may be fixed. If it is fixed, and as the term denotes, it must necessarily be fixed on some principle or criteria. Otherwise, no question of fixing an amount would arise; it would be merely naming an amount arbitrarily. The Advocate-General of Maharashtra was frank enough to admit that if principles are fixed, the amount to be determined thereunder becomes justiciable, but if the amount is fixed without stating any principles it is not justiciable and for this reason even the members of the Legislature, either of the opposition or of the ruling party, need not be told on what basis or principles the amount has been fixed, lest if this was disclosed the Courts would examine them. But how can this be avoided because if principles are fixed, the relevancy can be gone into as has been the consistent view of this Court, and yet it is said that if an amount is fixed without reference to any principles and arbitrarily, the Court cannot examine it. Such a view has no rational or logical basis. The Legislature, even in cases where it fixes an amount for the acquisition or requisition of a property, must be presumed to have fixed it on some basis, or applied some criteria or principles to determine the amount so fixed, and, therefore, where the law is challenged on the ground of arbitrariness, illusoriness or of having been based on irrelevant principles or any other ground that may be open to challenge by an expropriated owner, the State will have to meet the challenge, and the Court will have to go into these questions. This will be so even in respect to the manner of payment. Once it is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or illusory or where the principles upon which it was fixed were found to bear reasonable relationship to the value of the property acquired, the Court cannot go into the question of adequacy of the amount so fixed on the basis of such principles.

1167. Clause (2-B) makes sub-clause (*f*) of Article 19(1) inapplicable to clause (2) of Article 31. In the *Bank Nationalisation case* (supra), by a majority, of ten to one, this Court held after an exhaustive review of all the cases beginning from *A. K. Gopalan's case* (supra), that, "if the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation, may unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded. For instance, if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(*f*)" (p. 577).

1168. Thus, it will appear that where the acquisition is for a public purpose, what is sought to be excluded by clause (2-B) is the reasonableness of the procedural provisions by making Article 19(1)(*f*) inapplicable. Notwithstanding this amendment, it is apparent that the expropriated owner still continues to have the fundamental rights that his property will not be acquired save by the authority of law and for a public purpose. These propositions have been admitted by the learned Solicitor-General. The question whether an acquisition is for a public purpose is justiciable. Only the adequacy of the amount is not. If so, how can the expropriated owner establish that the acquisition is not for public purpose unless there are some procedural requirements to be complied with under the Law? A notice will have to be served; he will have to be given an opportunity to contest the acquisition. Clause (2-B) provides that "nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)". Does this mean that the Fundamental Right to reasonable restriction of procedural nature under Article 19(1)(*f*) which was available against any law of acquisition or requisition of property as held in the *Bank Nationalisation case* (supra), is abrogated or destroyed? The answer to this question would depend upon what is the meaning to be given to the word "affect". Two constructions are possible: one is that Article 19(1)(*f*) will not be available at all to an expropriated owner under a law of acquisition made under Article 31(2) or to put it in another way, any law made under Article 31(2) for acquisition or requisitioning of any property abrogates Articles 19(1)(*f*). Secondly, clause (2-B) was intended to provide that the law of acquisition or requisition will not be void on the ground that it abridges or affects the right under Article 19(1)(*f*). In choosing either of these constructions, regard must be had to that construction which would not result in the amendment being held invalid and void. Applying this approach, the second construction is more in consonance with the amendment because what the amendment provides for is that Article 19(1)(*f*) shall not affect any such law and this would imply that the bar against the application of Article 19(1)(*f*) to such a law may vary from a slight or partial encroachment to total prohibition or inapplicability. But since an amendment cannot totally abrogate a fundamental right, it can only be read by the adoption of the doctrine of "severability in application" and, accordingly

SCC Online

clause (2-B) must be held to be restricted only to the abridgement of, as distinct from abrogation, destroying or damaging the right under Article 19(1)(*f*) As I said earlier, the right to a reasonable procedure in respect of a law of acquisition or requisition for the effective exercise of the rights under Article 31(2), for a reasonable notice, a hearing opportunity to produce material and other evidence may be necessary to establish that a particular acquisition is not for a public purpose and for proving the value of the property and other matters that may be involved in a particular principle adopted in fixing the amount or for showing that what is being paid is illusory, arbitrary, etc.

1169. That apart, there is nothing in clause (2-B), to prohibit principles of natural justice which are part of the law of the land wherein the rule of law reigns supreme, from being applicable when the liberty of the individual or his property is affected by a law. I cannot read a sinister design in that amendment requiring the legislative organs to abrogate the rule of law in this country or deny to its citizens the benefit of the maxim '*audi alteram partem*' that no man shall be condemned unheard, a concept of natural justice, "deeply rooted in our ancient history", which as Byles, J., in *Cooper* v. *The Wadsworth Board of Works*,[35] expressed in the picturesque aphorism, "The laws of God and man both give the party an opportunity to make his defence, if he has any".

1170. There is one other aspect that has been stressed by the learned Advocate for the petitioner, which is more in the nature of the dire consequences that would ensue if the amendment is upheld, namely, that the citizens' right to property has now been transferred into the State's right to confiscation, that acquisition under the Land Acquisition Act and under other similar laws can be for the benefit of even Limited Companies in the private sector, and that religious freedoms guaranteed by Articles 25 to 30 can be virtually stifled by the taking away of the properties held by religious and charitable purposes. If Parliament under the law can do any of the things which are referred, this Court cannot prevent the consequences of a law so made. I have spelt out what can be done. The law made for acquisition under clause (2) of Article 31 has still to satisfy that it is being taken for a public purpose. The question whether acquisition for a private person or company is for public purpose may be open to challenge and determined by Courts in an appropriate action. As for the principles applicable in the Bill for the acquisition of Bardoli lands for determining the amount payable for acquisition, as admitted by both the learned Solicitor-General for the Union and the Advocate-General of Maharashtra will be applicable, then at any rate that will not be a case of confiscation, because an owner will at any rate get the amount paid by him together with the loss of interest for the years he had it. The plea that religious freedoms will be stifled also is not sustainable, because it has been already held by this Court in *Khajamian Wakf Estates, etc.* v. *The State of Madras*,[36] that Article 26(*c*) and (*d*) of the Constitution provide that religious denominations shall have the right to own and acquire property and administer them according to law. But that does not mean that the properties owned by them cannot be acquired by the State. In the view I have taken, and for the reasons set out above, I hold Section 2 of the Twenty-fifth Amendment valid.

1171. Section 3 of the Twenty-fifth Amendment has caused me considerable difficulty because on the one hand the amendment is designed to give effect to Article 39(*b*) and (*c*) of the Directive Principles of the State Policy in the larger interest of the community, and on the other the basic assumption underlying it is that this cannot be done without taking away or abridging any of the rights conferred by Articles 14, 19 and 31, and that such a law, where it contains a declaration that it is to give effect to the above policy, shall not be called in question in any Court on the ground that it does not give effect to such policy. The predominant articulate as well as inarticulate premise is not to hold invalid an amendment made under Article 368, if it conforms to the form and manner prescribed therein and is within the ambit of the amending power, but if the inexorable conclusion on a close scrutiny leads to a different conclusion it has to be so held. Article 31-C is as follows:

---

[35] 14 CB (NS) 180.

[36] (1971) 2 SCR 790: (1970) 3 SCC 894.

> "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

1172. The learned Advocate for the petitioner submits that Article 31-C subverts seven essential features of the Constitution: (*i*) it destroys the supremacy of the Constitution by giving a blank charter to Parliament and all the State Legislatures to defy and ignore the Constitution; (*ii*) it subordinates the Fundamental Rights to Directive Principles of State Policy and thus destroys one of the foundations of the Constitution; (*iii*) the "manner and form" of amendment laid down in Article 368 is virtually abrogated, inasmuch as while the Fundamental Rights still remain ostensibly on the Statute Book and Article 368 remains unamended, the Fundamental Rights can be effectively silenced by a law passed by a simple majority in the Legislature; (*iv*) ten Fundamental Rights which are vital for the survival of democracy, the rule of law, and the integrity and unity of the Republic, are in effect abrogated. Seven of these ten Fundamental Rights are unconnected with property; (*v*) Judicial Review and enforceability of Fundamental Rights another essential feature of the Constitution is destroyed, in that the Court is prohibited from going into the question whether the impugned law does or does not give effect to the Directive Principles; (*vi*) the State Legislatures which cannot otherwise amend Article 368 are permitted to supersede a whole series of Fundamental Rights with the result that Fundamental Rights may prevail in some States and not in others, depending upon the complexion of the State Government; and (*vii*) the protection to the minorities and their religious, cultural, linguistic and educational rights can be seriously affected on the ground that the law was intended to give effect to the Directive Principles.

1173. On behalf of the respondent—State of Kerala—the Advocate-General of Maharashtra submitted "that Article 31-C was introduced because of the reversal of *Gujarat* v. *Shantilal* (supra) in the *Bank Nationalisation case* (supra) which reverted, in substance, to the concept of full compensation", and in order to "exclude judicial review where the law provided for securing the principles provided in clause (*b*) or (*c*) of Article 39". There is, according to him, no delegation of power under Article 31-C on the State Legislatures to alter or amend the Constitution, but it merely removes the restrictions on the legislative power of the State Legislatures and Parliament imposed by the fundamental rights contained in Articles 14, 19 and 31 of the Constitution, which rights have been conferred by Part III and the contravention of which would have rendered any law void. In his submission what it amounts to is only removal of the restriction which can only be effected by making Article 13 inapplicable. Answering the question whether a law containing a declaration as envisaged in Article 31-C, the major portion of which has no connection with clause (*b*) or clause (*c*) of Article 39 would protect the law, it was submitted "that on the principle laid down by the Supreme Court in *Akadasi Padhan* v. *State of Orissa*[37] the answer must be in the negative", and that the proper construction to be put on the declaration referred to in Article 31-C is that the impugned law must satisfy the condition precedent that it is designed to secure the principles specified in clause (*b*) or clause (*c*) of Article 39, if it does not give effect to the principles, *Akadasi's case* (supra) would justify the Court in reading the provision relating to declaration as not covering a case, where only a few sections are in furtherance of Article 39(*b*) and (*c*) while others are unrelated to it. Another way of arriving at the same conclusion, according to him, is that Article 31-C postulates that there must be some nexus, however remote, between law and the directives of State poilcy embodied in Article 39(*b*) and (*c*)", and that "if no reasonable person could come to the conclusion that the impugned provisions of an Act protected by Article 31-C and the declaration made under it had any connection with Article 39(*b*) and (*c*), the Court could hold that the Act showed that the Legislature had proceeded on a mistaken view of its power, and that, therefore, the Court was not bound to give effect to the erroneous assumptions of the Legislature". The observations of Das Gupta, J. in *The Provincial Transport Service* v. *State Industrial Court*,[38] were cited. Answering the contention that since the principles in Article 39(*b*) and (*c*) are widely expressed and as such there would always be some connection between them and pratically any kind of law, the Advocate-General of Maharashtra said that the principles in Article 39(*b*) and (*c*) were designedly widely expressed but "that is not an objection to a law implementing those directives" because "public interest is a very wide concept and several rights are made subject to public interest", and that should not be the objection for upholding the validity of law. This answer appears to be vague and uncertain, for what is conceded in the earlier part is withdrawn in the latter.

1174. The submission of the learned Solicitor-General is firstly, that Article 31-C protects only law and not mere executive action; secondly, the law referred to therein must be made either by Parliament or State Legislature and does not include within itself ordinance, order, rule, regulation, notification, custom or usage in accordance with the procedure prescribed in Article 368; thirdly, the intention of the founding fathers who had enacted clauses (4) and (6) of Article 31 to give effect to the Directive Principles of State policy set out in Article 39(*b*) and (*c*), as the experience shows, could not be given effect to because of the constitutional hurdles which necessitated the Constitution (First Amendment) Act by which Articles 31-A and 31-B was added under which the operation of Part III as a whole was excluded.

---

[37] 1963 Supp 2 SCR 691: AIR 1963 SC 1047: (1964) 2 SCJ 37.

[38] (1963) 3 SCR 650: AIR 1963 SC 114: (1963) 2 SCJ 412: (1962) 2 Lab LJ 360.

According to him, the significance of this total exclusion of Part III is that it brings out in an unmistakable manner the true relationship between the provisions of Part IV and Part III of the Constitution, namely, that the liberty of the individual valuable as that is, will not operate as unsurmountable barrier in the path of legislative efforts towards the achievement of the goal of a society envisaged in Part IV and whenever and to whatever extent such a problem arose the amending process would be able to resolve it. He cited the observations of Das, J., in *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh and Others*,[39] that, "a fresh outlook which places the general interest of the community" above the interest of the individual pervades our Constitution", and of Hidayatullah, J., in his dissenting judgment in *Sajjan Singh's case* (supra) that, "the rights of society are made paramount and they are placed above those of the individual". These two observations, if I may say so, are torn out of context, particularly those of Hidayatullah, J., where after stressing fact that Article 19 by clauses (2) to (6) allows the curtailment of rights in the public interest, which goes to show that Part III is not static and visualises change and progress, but at the same time it preserves the individual rights, he said after citing the observation above referred, that, "This is as it should be" (p. 962). It is further the case of the Union of India that the only laws which will receive the protection of Article 31-C must disclose a nexus between the law and the objectives set out in Article 39(*b*) and (*c*) which is a condition precedent for the applicablity of Article 31-C and as such the question is justiciable and the only purpose of the declaration is to remove from the scope of judicial review questions of a political nature. As an example the learned Solicitor-General instanced a law dealing with divorce which could not be protected by a declaration nor can a law not attracting Article 31-C be protected by a declaration by merely mixing it with other laws really falling within Article 31-C with those under that Article. In such a case, therefore, the Court will always be competent to examine "the true nature and character of the legislation in the particular instance under discussion—its design and the primary matter dealt with—its object and scope. (1882) 7 AC at pp. 838-840". It was further averred that if a legislation enacted ostensibly under one of the powers conferred by the Consitution, is in truth and fact, really to accomplish an unauthorised purpose, the Court would be entitled to tear the veil and decide according to the real nature of the statute, as in *Attorney-General* v. *Queen Insurance Company*,[40] and that except Articles 14, 19 and 31 the rest of the relevant provisions of the Constitution will apply and the Court is entitled to go into and consider the challenge of infringement. of other rights, and that there are only three safeguards against the evil of discrimination, namely: (*a*) the innate good sense of the community and of the legislature and the administrator; (*b*) the proviso to Article 31-C requiring the President's assent; (*c*) the power of judicial review of the Courts to the extent not excluded, and of these, "The first safeguard is the only real safeguard ultimately and there is no real substitute for the character of the citizens". What is still open to the Court to examine is whether there is any violation of the provisions of Articles 15, 16, 286 and Part XIII (Articles 301, 303 and 304). The exclusion of Article 14, without excluding Articles 15, 16 etc., is only to enable the Legislatures and the Parliament to evolve new principles of equality in the light of the objectives set out in the Directive Principles without discrimination. The exclusion of Article 19 is on the footing that laws which are to give effect to the directives set out in Part IV must constitute reasonable restrictions on the individual's liberty and the exclusion of Article 31(2) is to introduce the considerations of social justice in the matter of acquisition.

---

[39] 1952 SCR 889 at p. 997: AIR 1952 SC 252: 1952 SCJ 354.

[40] (1873) 3 AC 1090.

1175. In so far as the question whether Article 31-C amounts to delegation of amending power to State Legislatures or to Parliament in its ordinary legislative capacity is concerned, the Solicitor-General submits that a class of legislation or a legislative field may be identified or categorised in several ways, for instance, with reference to the period within which the law is passed [Article 31(4) and Article 31(6)] or the topic of the legislation [Article 21(2) (*sic*) and Article 31-A]; or the objective or purpose of the legislation [Article 15(4)] for the advancement of the backward class of citizens; Article 31(5)(*ii*) for promotion of health and Article 33 for proper discipline in the forces etc. Article 31-C likewise carves out a legislative field with reference to the object of the legislation and in this respect it is similar to Articles 15(4), 31(*b*)(*ii*) and 33. Each of these articles creates a legislative field to achieve a social objective and for this purpose modifies the operation of some fundamental rights contained in Part III. Even assuming that Article 31-C involves an element of delegation of the amending power, he contends there is no violation of Article 368 and the absence of *non-obstante* clause or the label cannot make any difference and since Article 368 empowers its own amendment, it follows that the Article 31-C, if there is a partial substitution of an amending machinery and procedure, will operate as a partial modification of Article 368.

1176. It is contended that Article 31-C is similar to the legislative device adopted in Articles 31-A and 31-B, which was added by the Constitution (First Amendment) Act, 1950, the first of which declared that "Notwithstanding anything in the foregoing provisions of this Part (i. e. Part III), no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abrideges any of the rights conferred by, any provisions of this Part", namely, Part III. Article 31-B is also in similar terms and gives complete protection to the Acts specified in the Ninth Schedule from any of the provisions of Part III.

1177. In so far as Article 31-A was concerned, it authorised a law for the acquisition of an estate as defined in clause (2). Article 31-B as introduced by the First Amendment protected from challenge, on the ground of infringement of the rights in Part III, certain Acts enacted for agrarian reforms which, after very careful scrutiny that they pertain to agrarian reforms, were added to the Ninth Schedule. Zamindari abolition and agrarian reform had become an article of faith of free India and in respect of which the Bills either were pending at the time when the Constitution was being framed or they had been enacted into law after the commencement of the Constitution. The debates in the Constituent Assembly on Article 31 will disclose that after postponing its consideration for nearly a year, in the end a compromise was arrived at between those who were for the acquisition law to provide far payment of full compensation and those who wanted the right in Article 31 not to extend to the acquisition of land for giving effect to agrarian reforms. This compromise resulted in the inclusion of clauses (4) and (6) giving protection to laws made thereunder from being questioned in any Court; in the case of the former, to laws dealing with agrarian reforms in respect of which Bills were pending in any of the Legislatures of the States at the commencement of the Constitution and had been reserved for the consideration of the President who subsequently assented to them and to those laws which were passed not more than eighteen months before the commencement of the Constitution and if submitted within three months after such commencement to the President for his certification had been so certified by him by public notification. It was thought that the jurisdiction of the Courts would be barred in respect of the legislation of the character above mentioned, but the Patna High Court had held Article 14 was applicable and even when the appeals were pending in this Court, the Constitution (First Amendment) Act, 1950, was passed and Article 31-A and Article 31-B were added by an amendment of the Constitution. At the time only 13 Acts were added to the Ninth Schedule, but when some of the Members of the Provisional Parliament wanted to add several other Acts after the Bill had been scrutinised by the Select Committee, the Prime Minister pleaded with them not to do so. He said:

> "I would beg to them not to press this matter. It is not with any great satisfaction or pleasure that we have produced this long Schedule."

These debates animated as they were, make interesting reading and one gets the impression that what was being done was what the original framers had intended to do but could not give effect to the object because of lacunae in the language of the Article. The Prime Minister said:

> "If there is one thing to which we as a party have been committed in the past generation or so it is the agrarian reforms and the abolition of the Zamindari system."

"Shri Hussain Imam (Bihar):

> 'With compensation'."

"Shri Jawaharlal Nehru:

> 'With adequate and proper compensation not too much'."

"Shri Hussain Imam:

> 'Adequate is quite enough'."

Shri Shyama Prasad Mukherjee, representing the opposite view, pointed out the dangers inherent in the amendment, not because he was against the agrarian reforms but because of the precedent this would create. He said: "By this amendment to the Constitution you are saying that whatever legislation is passed it is deemed to be the law. Then why have your fundamental rights? Who asked you to have these fundamental rights at all? You might have said: Parliament is supreme and Parliament may from time to time pass any law in any matter it liked and that will be the law binding on the people". In referring to a few excerpts, I merely want to show what was the object of the amendment and what were the fears entertained in respect thereof.

1178. The First Amendment was challenged in *Sankari Prasad's case* (supra), but this Court held it valid. The question, as we have seen earlier, was whether Article 13(2) imposed a bar on Article 368 from amending fundamental rights? It was held that it did not, but no contention was urged or agitated before it that even apart from Article 13(2), the amending power did not extend to the abrogation of fundamental rights. In *Sajjan Singh's case* (supra) principal point which was urged was that the impugned Constitution (Seventeenth Amendment) Act was invalid for the reason that before presenting it to the President for his assent the procedure prescribed by the proviso to Article 368 had not been followed, though the Act was one which fell within the scope of the proviso. It was, however, not disputed before the Court that Article 368 empowered Parliament to amend any provision of the Constitution including the provisions in respect of fundamental rights enshrined in Part III. Hidayatullah and Mudholkar, JJ. did, however, express doubts as to whether it is competent for Parliament to make any amendment at all to Part III of the Constitution (see pp. 961 and 968). Mudholkar, J., further raised the question whether the Parliament could go to the extent it went when it enacted the First Amendment Act and the Ninth Schedule and has now added 44 agrarian law to it? Or was Parliament incompetent to go beyond enacting Article 31-A in 1950 and now beyond amending the definition of estate? (p. 969). Even in *Golaknath case* (supra) the question raised before us was not conclusively decided. In this state of law to say that since Article 31-C is similar to Article 31-A and Article 31-B and since the latter were held to be valid in *Sankari Prasad case* (supra), fundamental rights could be abrogated by an amendment, would not be justified. It may be observed that both in *Sajjan Singh case* (supra) and *Golaknath case* (supra) one of the grounds which was taken into consideration was that if the amendment was held invalid, millions of people will be affected and since in the latter case the majority had held that Parliament could not by amendment under Article 368 effect fundamental rights, the doctrine of prospective overruling or acquiescence was resorted to. But since the crucial question of the extent of the power of amendment has been mooted in this case before the largest Bench constituted so far and has been fully argued, this aspect can be reconsidered. In this regard, Gajendragadkar, C. J., while considering the question of *stare decisis*, observed in *Sajjan Singh case* (supra) (at pp. 947-948):

> "It is true that the Constitution does not place any restriction on our power to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good. The doctrine of *stare decisis* may not strictly apply in this context and one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this Court to the detriment of general welfare. Even so, the normal principle that judgments pronounced by this Court would be final, cannot be ignored and unless considerations of substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them."

1179. I have already pointed out that two of the learned Judges did doubt the power of Parliament to amend fundamental rights and since then this question has not remained unchallenged either on the ground of Article 13 (2) preventing such amendments or on other grounds urged before us. In these circumstances, it is not correct to say that just because the validity of Articles 31-A and 31-C was sustained by this Court, though in *Golaknath case* (supra) it may have been on the grounds of expediency, Article 31-C must also on that account be sustained. However, an analogy of other Articles like Article 33, Article 15(4) and Article 16(4) is sought to be put forward in support of the contention that a similar device has been adopted in Article 31-C. I find that in none of the articles to which the learned Solicitor-General has drawn our attention, is there a total abrogation of any of the rights as sought to be affected by Article 31-C. Article 33 for example, restricts or abrogates fundamental rights in Part III only in respect of the discipline of Armed Forces or forces charged with the maintenance of public order and nothing more. It does not extend to discrimination in recruitment to the service nor to any other rights possessed by the citizens in the Armed Forces which are unrelated with the proper discharge of their duties and the maintenance of discipline among these forces. Article 15(4) which was referred to as an example of empowerment based on objective or purpose of legislation, has no anology with Article 31-C. In the first place, Article 15 is an exception to the classification which would have been permissible under Article 14, for instance on the basis of religion, race, caste, sex and place of birth and hence Article 15 prohibits such a classification in the case of citizens, and Article 16 makes a like provision in the case of public employment with the addition of "descent". The restriction is only to a limited extent from out of an area which permits the making of wide variety of classification. Clause (4) of Article 15 was added by the Constitution (First Amendment) Act, 1950, to enable a state to make provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. Clause (4) of Article 16 likewise enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The effect of these amendments is to permit the making of classification for favourable treatment on the ground that the persons so favoured were Scheduled Castes, Scheduled Tribes, etc., which would otherwise have been permissible under Article 14 to the extent of its reasonable relationship with the objects of the law, had the same not been prohibited by Article 15(1) and Article 16(2). These provisions do not in any way abrogate the right in Article 14 and I do not think the analogy between these provisions and Article 31-C is apt.

1180. The Directives under Article 39(*b*) and (*c*) are wide and indeterminate. They affect the whole gamut of human activity *vis-a-vis* the society. The State is enjoined to ensure that ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These objectives are ends which may be implemented by a party in power through legislative action by resort to any one of the diverse philosophies, political ideologies and economic theories. The implementation of these objectives is the means. These theories and ideologies both political, economic and sociological may vary and change from generation to generation and from time to time to suit the social conditions, existing during any particular period of history. We have in the world to-day countries adopting different political systems, according to the historical development of economic thought, the philosophy and ideology which is considered best to subserve the common good of that particular society. There is no standardisation, and what is good for one country may not be suitable to another. The accelerating technological advance and the exploitation of these developments and discoveries indicate the economic thought prevalent in that society. The various theories are, therefore, related to the development and the practical means which are adopted for achieving the ends. In a developing country such as ours, where millions are far below the standard of sustenance and have not the means of having the normal necessities of life, there is further a deeper philosophical question of the kind of society and the quality of life which has to be achieved. It is, therefore, the duty of the State to devise ways and means of achieving the ends. A Government which comes to power with a particular political philosophy and economic theory as having been endorsed by the electorate, has to give effect to that policy in the manner which it considers best to subserve the end. Any legislation to give effect to the principles and policy to achieve these ends is the legislative judgment which is not within the province of Courts to examine as to whether they in fact subserve these ends as "otherwise there would be a conflict between the Judges and Parliament as to whether something was good for the country or not, and the whole machinery of justice was not appropriate for that consideration" [See *Liyanage's case* (supra) at p. 267]. The Government and Parliament or the Government and Legislature of a State have within the sphere allotted to each other, the undoubted right to embark on Legislative action which they think will ensure the common good, namely, the happiness of the grestest number and so they have the right to make mistakes and retrace any steps taken earlier to correct such mistakes when that realisation dawns on them in giving effect to the above objectives. But if the power to commit any mistake through democratic process is taken away as by enabling an authoritarian system, then it will be the negation of Parliamentary democracy. The State, therefore, has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts, as I said, have no function in the evaluation of these policies or in determining whether they are good or bad for the community, they have, however, in examining legislative action taken by the State in furthering the ends, to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined. It is, therefore, necessary to keep in view the wide field of Governmental activity enjoined in Article 39(*b*) and (*c*) in determining the reach of the means to achieve the ends and the impact of these means on the Fundamental Rights which Article 31-C affects.

1181. The impugned Article 31-C enables Parliament and the State Legislatures to make laws unfettered by Articles 14, 19 and 31 in respect of the wide and undefined field of objectives indicated in Article 39(*b*) and (*c*). All these objectives before the amendment had to be achieved by the exercise of the Legislative power enumerated in VII Schedule which would ordinarily be exercised within the limitations imposed by the Constitution and the fundamental rights. The amendment removes these limitations, though the law made must still be within the legislative powers conferred under the VII Schedule, and enables Parliament and the State Legislatures, subject to one-tenth quorum of its members present and by a simple majority, to enact laws which contravene the fundamental rights conferred under Articles 14, 19 and 31 and which Parliament by complying with the form and manner provided under Article 368, could alone have effected. Whether one calls this removing restrictions on the legislative organs or of conferring complete sovereignty on them within the wide field inherent in Article 39(*b*) and (*c*) is in effect one and the same. It is contended that in conferring this power by Article 31-C on Parliament and the State Legislatures, acting under Articles 245 to 248, Parliament has abdicated its function under Article 368 and has permitted amendments being made without complying with the form and manner provided thereunder.

1182. It is not necessary in the view I am taking to consider the question whether Article 31-C delegates the power of amendment to the State Legislatures and Parliament or that it does not indicate the subject-matter of legislation as in Article 31-A but merely purports to enable the legislative organs to choose the subject-matter from a field which, as I said, is as wide and indeterminate as the term "operation of the economic system" would denote. I would prefer to consider Article 31-C as lifting the bar of the articles specified therein, and in so far as the subject matter of the legislation is concerned, though the field is wide, any of the modes to give effect to the directives can only be a mode permissible within the legislative power conferred on the respective legislative organ under the Schedule VII to the Constitution.

1183. If Parliament by an amendment of the Constitution under Article 368, cannot abrogate, damage or destroy the basic structure of the Constitution or any of the essential elements comprising that basic structure, or run counter to defeat the objectives of the constitution declared in the Preamble and if each and every fundamental right is an essential feature of the Constitution, the question that may have to be considered is whether the amendment by the addition of Article 31-C as a fundamental right in Part III of the Constitution has abrogated, damaged or destroyed any of the fundamental rights.

1184. Article 31-C has 4 elements: (*i*) it permits the Legislature to make a law giving effect to Article 39(*b*) and Article 39(*c*) *inconsistent* with any of the rights conferred by Articles 14, 19 and 31; (*ii*) it permits the Legislature to make a law giving effect to Article 39(*b*) and Article 39(*c*) *taking away* any of the rights conferred by Articles 14, 19 and 31; (*iii*) it permits the legislature to make a law giving effect to Article 39(*b*) and (*c*) *abridging* any of the rights conferred by Articles 14, 19, 31; and (*iv*) it prohibits calling in question in any Court such a law if it contains a declaration that it is for giving effect to the policy of State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39 on the ground that it does not give effect to such a policy of the State.

1185. The first element seems to have been added by way of abundant caution, for it takes in the other two elements, namely, taking away and abridging of the rights conferred by Articles 14, 19 or 31. However, it would be *ultra vires* the amending power conferred by Article 368, if it comprehends within it the damaging or destruction of these fundamental rights. The second element, namely, *taking away* of these fundamental rights would be *ultra vires* the amending power, for taking away of these fundamental rights is synonymous with destroying them. As far the third element, namely, *abridging* of these rights, the validity will have to be examined and considered separately in respect of each of these fundamental rights, for an abridgment of the fundamental rights is not the same thing as the damaging of those rights. An abridgment ceases to be an abridgment when it tends to effect the basic or essential content of the right and reduces it to a mere right only in name. In such a case it would amount to the damaging and emasculating the right itself and would be *ultra vires* the power under Article 368. But a right may be hedged in to a certain extent but not so as to affect the basic or essential content of it or emasculate it. In so far as Article 31-C authorises or permits abridgment of the rights conferred by Article 19, it would be *intra vires* the amending power under Article 368 as thereby the damaging or emasculating of these rights is not authorised. It will, therefore, be necessary to examine what exactly Article 14 and Article 19 guarantee.

1186. The guarantee of equality contained in Article 14 has incorporated the principle of "liberty" and "equality" embodied in the Preamble to the Constitution. The prohibition is *not* only against the Legislatures but also against the executive and the local authorities. Two concepts are inherent in this guarantee—one of 'equality before law', a negative one similar to that under the English Common Law; and the other 'equal protection of laws', a positive one under the United States Constitution. The negative aspect is in the prohibition against discrimination and the positive content is the equal protection under the law to all who are situated similarly and are in like circumstances. (See Subba Rao, J., in *State of U. P.* v. *Deoman Upadhyaya*).[41]

1187. The impact of the negative content on the positive aspect has not so far been clearly discerned in the decisions of this Court which has been mostly concerned with the positive aspect. Again, Subba Rao, J., in his dissenting judgment in *Lachhman Das on behalf of Firm Tilak Ram Ram Bux* v. *State of Punjab*,[42] while holding that the Patiala Recovery of State Dues Act did not offend Article 14 of the Constitution, said at p. 395:

> "It shall also be remembered that a citizen is entitled to a fundamental right of equality before the law and that the doctrine of classification is only a subsidiary rule evolved by Courts to give a practical content to the said doctrine. Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibily deprive the article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law and equal protection of the laws may be replaced by the doctrine of classification."

In *Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar and Others*,[43] Das, C. J., summed up the principle enunciated in several cases referred to by him and consistently adopted and applied in subsequent cases, thus:

> "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be found on different bases, namely geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

1188. In subsequent cases a further principle has been recognised by which Article 14 was also not to be violated by the two laws dealing with the same subject-matter, if the sources of the two laws are different. (See *State of Madhya Pradesh* v. *G. C. Mandawar*.)[44] I am not for the present concerned whether this latter principle is likely to mislead but would refer only to the various aspects of the classification recognised in this Court so far. It may, however, be pointed out that though the categories of classification are

---

41. (1961) 1 SCR 14 at p. 34: AIR 1960 SC 1125: (1961) 2 SCJ 334: 1960 Cri LJ 1504.
42. (1963) 2 SCR 353: AIR 1963 SC 222.
43. 1959 SCR 279: AIR 1958 SC 538: 1959 SCJ 147.
44. (1955) 1 SCR 599: AIR 1954 SC 493: 1954 SCJ 503.

never closed, and it may be that the objectives of Article 39(*b*) and (*c*) may form a basis of classification depending on the nature of the law, the purpose for which it was enacted and the impact which it has on the rights of the citizens, the right to equality before the law and equal protection of laws in Article 14 cannot be disembowelled by classification.

1189. The lifting of the embargo of Article 14 on any law made by Parliament or the Legislature of a State under Article 31-C, by providing that no law made by these legislative organs to give effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the right conferred therein, would, in my view, abrogate that right altogether. I have held that Parliament cannot under Article 368 abrogate, damage or destroy, any of the fundamental rights though it can abridge to an extent where it does not amount to abrogation, damage or destruction. The question is, whether the words "inconsistent with or takes away, or" if severed, will achieve the purpose of the amendment? In what way can the abridgment of Article 14 be effected without robbing the content of that right? Can a law permitted under Article 31-C affect persons similarly situated unequally or would equal protection of laws not be available to persons similarly situated or placed in like circumstances? While Article 39(*b*) and (*c*) can provide for a classification, that classification must have a rational relation to the objectives sought to be achieved by the statute in question.

1190. In so far as the abridgment of the right conferred by Article 14 is concerned, it would be *ultra vires* for the reason that a mere violation of this right amounts to taking away or damaging the right. The protection of the right was denied in Article 31-A because the Courts had held invalid under Article 14, the provisions of certain land reform legislations relating to compensation for the acquistion etc., of the estates. The necessity for the exclusion of Article 14 from being applied to laws under Article 31-C is not apparent or easy to comprehend. No law under Article 31-C could possibly be challenged under Article 14 by the owners or the holders of the property, for the reason that to treat all owners or holders of property equally in matters of compensation would be contrary to the very objects enshrined in Article 39(*b*) and (*c*). Any rational principles of classification devised for giving effect to the policies adumbrated in Article 39(*b*) and (*c*) will not be difficult to pass the test of equal protection of the laws under Article 14. The exclusion of Article 14 in Article 31-A was confined to the aspect of acquisition and compensation in respect of land reforms laws, but, however, the laws under Article 31-A were not immune from attack under Article 14, if the measures of agrarian reforms were tainted with arbitrariness. Though this question has not been finally decided by this Court in any of the cases under Article 31-A, it was raised in *Balmadies Plantations Ltd. and Others* v. *State of Tamil Nadu*,[45] where the appellants contended that it would not be open to the Government under Section 17 of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969, to terminate by notice the right of the lessee as that would be violative of the rights under Articles 14, 19 and 31 of the Constitution This Court, however, did not find it necessary to deal with this aspect of the matter, because it was admitted that no notice about the termination of the lessee's rights had been issued under Section 17 of the Act to any of the appellants, and that question can only arise after the Act came into force. It was further observed by one of us, Khanna, J., speaking for the Court (Page 150, Para 21):

---

[45] (1972) 2 SCC 133, 150.

> "Even after the Act comes into force, the Government would have to apply its mind to the question as to whether in its opinion it is in public interest to terminate the rights of the plantation lessees. Till such time as such a notice is given, the matter is purely of an academic nature. In case the Government decides not to terminate the lease of the plantation lessees, any discussion in the matter would be an exercise in futility. If on the contrary, action is taken by the Government under Section 17 in respect of any lease of land for purposes of the cultivation of plantation crop, the aggrieved party can approach the court for appropriate relief."

It may be mentioned that in that case Section 3 of the Act, in so far as it related to the transfer of forests in Janmam estates to the Government was concerned was held to be violative of the Constitution It cannot, therefore, be said that this aspect of the matter is not *res integra*. On the other hand, it lends support to the view that the law can be challenged.

1191. The decisions of this Court in *Nagpur Improvement Trust* v. *Vithal Rao*,[46] and the other two cases* following it also do not affect my view that Article 14 is inapplicable to matters dealing with compensation under laws enacted to give effect to policies of Article 39(*b*) and (*c*). In the above case it was the State which was given the power to acquire property for the same public purpose under two different statutes, one of them providing for lesser compensation and the other providing for full compensation. My Lord the Chief Justice, delivering the judgment of the Constitution Bench of seven Judges, while holding that these provisions contravened Article 14, observed at p. 506:

> "It would not be disputed that different principles of compensation cannot be formulated for lands acquired on the basis that the owner is old or young, healthy or ill, tall or short, or whether the owner has inherited the property or built it with his own efforts, or whether the owner is a politician or an advocate. Why is this sort of classification not sustainable? Because the object being to compulsorily acquire for a public purpose, the object is equally achieved whether the land belongs to one type of owner or another type."

There was no question in the above case of either distribution of ownership and control of material resources or the breaking up of concentration of wealth or the means of production which is an object different from that envisaged in Article 31(2). If in two given cases similarly circumstanced the property of one is taken under Article 31-C and that of the other under Article 31(2), then it will amount to discrimination and the *Nagpur Improvement Trust case* (supra), will apply. In a case of this nature, the objection is not so much to Article 14 being applied, but of adopting methods which run counter to Article 39(*b*) and (*c*), because the person who though similarly situated as that of the other is certainly favoured for reasons unconnected with Article 39(*b*) and (*c*). It cannot, therefore, be said that Article 14 has been misapplied or was hindrance to the furtherance of the directive principles in Article 39(*b*) and (*c*), which is professed to be the object of implementation in such a case. If no such abuse is to be presumed, then there is no warrant for the apprehension that Article 14 will hinder the achievement of the said Directives.

---

[46] (1973) 1 SCC 500.

* (1973) 1 SCC 510.

1192. The sweep of Article 31-C is far wider than Article 31-A, and Article 14 is excluded in respect of matters where the protection was most needed for the effectuation of a genuine and *bona fide* desire of the State contained in the directives of Article 39(*b*) and (*c*). For instance, persons equally situated may be unequally treated by depriving some in that class while leaving others to retain their property or in respect of the property allowed to be retained or in distributing the material resources thereby acquired unequally, showing favour to some and discriminating against others. To amplify this aspect more fully, it may be stated that in order to further the directives, persons may be grouped in relation to the property they own or hold, or the economic power they possess or in payment of compensation at different rates to different classes of persons depending on the extent or the value of the property they own or possess, or in respect of classes of persons to whom the material resources of the country are distributed. The object of clauses (*b*) and (*c*) of Article 39 is the breaking up of concentration of wealth or the distribution of material resources. If full compensation is paid for the property taken in furtherance of the objectives under Article 39(*b*) and (*c*), the very objective sought to be implemented would fail, as there would in fact be no breaking up of concentration of wealth or distribution of material resources. It is, therefore, clear that the very nature of the objectives in such that Article 14 is inapplicable, firstly, because in respect of compensation there cannot be a question of equality, and secondly, the exclusion thereof is not necessary because any law that makes a reasonable classification to further the objectives of Article 39(*b*) and (*c*) would undoubtedly fulfil the requirements of Article 14. The availability of Article 14 will not really assist an expropriated owner or holder because the objectives of Article 39(*b*) and (*c*) would be frustrated if he is paid full compensation. On the other hand, he has no manner of interest in respect of equality in the distribution of the property taken from him, because he would have no further rights in the property taken from him. The only purpose which the exclusion of Article 14 will serve would be to facilitate arbitrariness, inequality in distribution or to enable the conferment or patronage, etc. This right under Article 14 will only be available to the person or class of persons who would be entitled to receive the benefits of distribution under the law In fact the availability of Article 14 in respect of laws under Article 31-C would ensure 'distributive justice' or 'economic justice', which without it would be thwarted. In this view of Article 31-C *vis-a-vis* Article 14 any analogy between Article 31-C and Article 31-A which is sought to be drawn is misconceived, because under the latter provision the exclusion of Article 14 was necessary to protect the subject-matter of legislation permissible thereunder in respect of compensation payable to the expropriated owner. There is another reason why there can be no comparison between Article 31-A and Article 31-C, because in Article 31-A the exclusion of Article 14 was confined only to the acquisition, etc. of the property and not to the distribution aspect which is not the subject-matter of that Article whereas, as pointed out already, the exclusion of Article 14 affects distribution which is the subject-matter of Article 39(*b*) and (*c*).

1193. It is not necessary to examine in detail the mischief that the abridgment or taking away of Article 14 will cause. It is not an answer to say that this may not be done and abuse should not be presumed. This may be true, but what I am concerned with is the extent of the power the legislative organs will come to possess. Once the power to do all that which has been referred above is recognised, no abuse can be presumed. But if the power does not extend to destruction, damage or abrogation of the right, the question of abuse, if any, has no relevance. It cannot be presumed that Parliament by exercising its amending power under Article 368, intended to confer a right on Parliament and the Legislatures of the States to discriminate persons similarly situated or deprive them of equal protection of laws. The objectives sought to be achieved under Article 39(*b*) and (*c*) can be achieved even if this Article is severed.

1194. In respect of the exclusion of Article 19 by Article 31-C a question was asked by one of us during the course of arguments addressed by the learned Advocate-General for Maharashtra on January 12, 1973, the thirty-fifth day, as to, what is the social content of the restriction on freedom of speech and freedom of movement which are not already contained in the restrictions to which those rights are subject? The learned Advocate-General said he would consider and make his submissions. On March 1, 1973, he made his submissions on the understanding that the question was asked in the context of Article 31-C which excludes the operation of whole of Article 19 and not only Article 19(1)(*f*) and Article 19(1)(*g*). The learned Advocate-General characterised the question as raising a matter of great importance. In my view, what was implied in the question was the core of the issue before us, as to whether there can be any justification for imposing more restrictions on such valuable rights as freedom of movement and freedom of speech than what the framers of the Constitution had already provided for in Article 19(2) to (6). After referring to the history and objects and reasons for enacting Constitution, First, Fourth and Seventeenth Amendments, and after referring to the decisions of this Court all of which relate to acquisition of property and have nothing to do either with freedom of speech or freedom of movement, he considered and answered the question posed under the following heads as under:

> "(*i*) Generally, with reference to reasonable restrictions to which the fundamental right conferred by Article 19(1)(*a*) to (*g*) are subject under Article 19(2) to (6);
>
> (*ii*) the reasonable restrictions to which the right to freedom of speech and the right to move throughout the territory of India should be made subject under Article 19(2) and (5) respectively."

1195. Under the first head he submitted the proposition that the social content of the restrictions to which the fundamental rights under Article 19(1)(*a*) to (*g*) are subject is narrower than all relevant social considerations to which the fundamental rights could be made subject. The reasons given were again the historical ones particularly the fact that the Constituent Assembly had rejected the suggestion made by Shri B N. Rau that in case of conflict between fundamental rights and the directives, the directives should prevail, otherwise necessary social legislation might be hampered. This meant that the special content of the Directive Principles was wider than the social content of permissible restrictions on fundamental rights. For, if this were not so, no question of giving primacy to Directive Principles in the case of conflict with fundamental rights could arise as the social content of fundamental rights and the Directive Principles would be the same. Since the Constitution gave primacy to fundamental rights over the Directives, making fundamental rights enforceable in a Court of law and the directives not so enforceable, the social content of the restrictions on fundamental rights was placed in the framework of the enforcement f rights by citizens or any person. This enforcement of individual fundamental rights naturally disregarded the injury to the public good caused by dilatory litigation which can hold up large schemes of necessary social legislation affecting a large number of people.

To prevent this social evil, the First and the Fourth Amendments to the Constitution were enacted.

1196. The social content of restrictions which can be imposed under Article 19(2) to (6) naturally does not take in the injury to the public good by dilatory litigation holding up large schemes of social legislation. The fundamental rights conferred by Article 19(1)(*a*) to (*g*) are not mutually exclusive but they overlap. For example, the right to move peaceably and without arms conferred by Article 19(1)(*b*) may be combined with the right to freedom of speech and expression, if those who assemble peaceably carry placards or deliver speeches through microphones. Again, the right to carry on business under Article 19(1)(*g*) would overlap the right to hold, acquire and dispose of property, for ordinarily, business cannot be carried on without the use of property. This consideration must be borne in mind in considering the question why Article 31-C excluded the challenge to the laws protected by Article 31-C under the whole of Article 19, instead of excluding a challenge only under Article 19(1)(*f*) which relates to property; and Article 19(1)(*g*) which relates to business, which would ordinarily require the use of property.

1197. Under the second head, he submitted that it is well settled that the right to freedom of speech includes the freedom of the Press, and thereafter referred to 'Press in a Democracy'—Chapter X of Modern Democracies by Lord Bryce, and long extracts were given from the above chapter, dealing with the change which had come over the Press and the dictatorship of a syndicated Press. The First Amendment of the U. S. Constitution was also referred. He thereafter submitted that our Constitution guarantees a freedom of speech and expression and by judicial construction that freedom has been held to include freedom of the Press. But according to him the freedom of speech as an individual right must be distinguished from the freedom of the Press and since ordinarily people asserting their individual right to the freedom of speech are not carrying on any trade or business and a law of acquisition has no application to individual exercise of the right to the freedom of speech and expression, Article 31-C can equally have no application to such individual right to the freedom of speech and expression. But different considerations apply when the freedom of speech and expression includes the Press, the running of which is clearly a business.

1198. Article 19(1)(*a*) is so closely connected with Article 19(1)(*g*) and (*f*) that if the last two sub-articles are excluded by a law relating to the acquisition of property, it is necessary to exclude Article 19(1)(*a*) to prevent an argument that the rights are so inextricably mixed up that to impair the right to carry on the business of running a Press or owning property necessary for running the Press is to impair the right to freedom of speech. Again, the right to freedom of movement throughout the territory of India has been clubbed together by Article 19(5) with the right to reside and settle in any part of the territory of India, conferred by Article 19(1)(*c*) and the right to acquire, hold and dispose of property conferred by Article 19(1)(*f*) for the purpose of imposing reasonable restrictions in the interest of general public or for the protection of the interest of any Scheduled Tribe.

1199. After referring to the observations of Patanjali Sastri and Mukherjea, JJ., in *Gopalan's case* (supra), the learned Advocate-General submitted that those observations show that if a law of land acquisition was to be protected from challenge under Article 19(1)(*f*), it was necessary to protect it from challenge under Article 19(1)(*d*) and (*e*) to foreclose any argument that the rights under Article 19(1)(*d*), (*e*) and (*f*) are so closely connected that to take away the right under Article 19(1)(*f*) is to drain the rights under Article 19(1)(*d*) and (*e*) of their practical content. For these reasons, Parliament in enacting the First, Fourth and Seventeenth Amendments rightly excluded the challenge under the whole of Article 19 to the laws protected by those amendments and not merely a challenge under Article 19(1)(*f*) and (*g*). In the result, it was submitted that Article 31-C only contemplates the process of giving primacy to the Directive Principles of State Policy over fundamental rights, first recognised in Article 31(4) and (6) and then extended by Article 31-A and 31-B and Schedule IX as first enacted and as subsequently amplified by the Fourth and the Seventeenth Amendments all of which have been held to be valid. Directive Principles are also fundamental and the amending power is designed to enable future Parliament and State Legislatures to provide for the changes in priorities which take place after the Constitution was framed and the amending power is extended to enacting Article 31-C.

1200. I have set out in detail what according to the learned Advocate-General is the basis and the *raison d'etre* for excluding Article 19 by Article 31-C. This able analysis surfaces the hidden implications of Article 31-C in excluding Article 19. On those submissions the entire fundamental rights guaranteed to the citizens are *in effect* abrogated. Article 14 is taken away; Article 19(1)(*a*) to (*g*) is excluded on the ground that each of them have their impact on one or the other of the rights in Part III and since these rights are not mutually exclusive and any property and trade or business affected by legislation under Article 31-C which necessarily must deal with property, if the directives in Article 39(*b*) and (*c*) are to be given effect, will in turn, according to the learned Advocate-General, come into conflict not only with Article 19(1)(*f*) and (*g*), but with the other sub-clauses (*a*) to (*e*) of clause (1) of that Article.

1201. As far as I can see, no law, so far enacted under Article 31-A and challenged before this Court has attempted to affect any of the rights in Article 19(1)(*a*) to (*e*), except Article 19(1)(*f*) and (*g*) and, therefore, this question did not fall for consideration of this Court. But that apart, I cannot understand by what logic the freedom to assemble peaceably and without arms, or for a citizen to move freely throughout India or to reside and settle in any part of the territory of India, has anything to do with the right to acquire and dispose of property or to practice any profession or to carry on any occupation, trade or business Are persons whose trade and business is taken away, or are deprived of their property not entitled to the guaranteed rights to move freely throughout India or settle in any part of India or to practise any profession or occupation? What else can they do after they are deprived of their property but to find ways and means of seeking other employment or occupation and in that endeavour to move throughout India or settle in any part of India? If they are prohibited from exercising these basic rights, they will be reduced to mere serfs for having owned property which the State in furtherance of its policy expropriates. If the law made under the directives has nothing to do with property, how does the duty to prevent the operation of the economic system from resulting in concentration of wealth and means of production, has any relevance or nexus with the movement of the citizens throughout India or to settle in any part of India? Are those to whom property is distributed in furtherance of the directive principles, ought not to be secured against infringement of those rights in property so distributed by laws made under Article 31-C? It would seem that those for whose benefit legislation deprives others in whom wealth is concentrated themselves may not be protected by Article 19 and

Article 14, if Article 31-C can take away or destroy those rights. Without such a protection they will not have a stake in the survival of democracy, nor can they be assured that economic justice would be meted out to them. Nor am I able to understand why where an industry or undertaking is taken over, is it necessary to take away the right of the workers in that industry or undertaking to form associations or unions. The industry taken away from the owners has nothing to do with the workers working therein, and merely because they work there they will also be deprived of their rights. I have mentioned a few aspects of the unrelated rights which are abridged by Article 31-C. No doubt, the recognition of the freedom of Press in the guarantee of freedom of speech and expression under Article 19(1)(*a*) was highlighted by the learned Advocate-General of Maharashtra. Does this mean that if a monopoly of the press is prohibited or where it is sought to be broken up under Article 39(*b*) and (*c*) and the printing presses and undertakings of such a Press are acquired under a law, should the citizens be deprived of their right to start another Press, and exercise their freedom of speech and expression? If these rights are taken away, what will happen to the freedom of speech and expression of the citizens in the country, which is a concomitant or Parliamentary democracy ? In the *State of Bombay and Another v. F. N. Balsara,*[47] it was held under the unamended clause (2) of Article 19 that Section 23(*a*) and Section 24(1)(*a*) which prohibited "commending" or advertising intoxicants to public were in conflict with the right guaranteed in Article 19(1)(*a*) as none of the conditions in clause (2) of that Article applied. But the First Amendment has added 'incitement to an offence' as a reasonable restriction which the State can provide by law. In any case, the absence of such a law making power is no ground to abrogate the entire right of free speech and expression of the citizens.

1202 Article 15 merely confines the right to those who are not women (*sic*) socially and educationally backward classes of citizens, scheduled castes or scheduled tribes all of whom were afforded protective discrimination. Article 16 is again similarly conditioned. Articles 17, 18, 23 and 24 are prohibitions which the State is enjoined to give effect to. Articles 25 to 28 guarantee religious freedom, can be affected by Article 31-C in furtherance of directive principles because these denominations own properties, schools, institutions, etc., all of which would be meaningless without the right to hold property. Likewise, Articles 29 and 30 would become hollow when Articles 19 and 14 are totally abrogated. The only rights left are those in Articles 20, 21 and 22, of which Article 22 has abridged by reason of clauses (4) to (7) by providing for preventive detention, which no doubt, is in the larger interest of the security, tranquillity and safety of the citizens and the State. I have pointed out the implications of the contentions on behalf of the respondents to show that if these are accepted, this country under a Constitution and a Preamble proclaiming the *securing* of fundamental rights to its citizens, will be without them. The individual rights which ensure political rights of the citizens in a democracy may have to be subordinated to some extent to the Directive Principles for achieving social objectives but they are not to be enslaved and driven out of existence. Such could not have been contemplated as being within the scope of the amending power.

1203. Although Article 31-A protected the laws coming within its purview from the rights conferred by Article 19, such a protection could only be against the rights conferred by clauses (*f*) and (*g*) of Article 19(1), as its subject-matter was expressly stated to be the acquisition of or extinguishment or modification of rights in any estate as defined in clause (2) thereof, and the taking over or amalgamation or termination, etc., of rights of management and certain leasehold interests. Article 31-C protects laws giving effect to the policies in Article 39(*b*) and (*c*). For achieving these twin objects the rights of the persons that have to be abridged could only be those rights in Article 19 which relate to property and trade, business, profession or occupation. Though the expression 'economic system' is used in Article 39(*c*), that article has not the object of changing the economic system generally, but is confined to only preventing concentration of wealth and means of production to the common detriment. What this clause envisages is that the State should secure the operation of the economic system in such a way as not to result in the concentration of wealth and means of production to the common detriment. Where there is already concentration of wealth and means of production which is to the common detriment, the law under Article 39(*c*) would be only to break up or regulate as may be necessary the concentration of wealth and means of production. All other rights are outside the purview of Article 31-C and in this respect Article 31-A and Article 31-C can be said to be similar in scope and no different. In my view, therefore, the learned *Solicitor-General* has rightly submitted that the law under Article 31-C will only operate on "material resources", "concentration of wealth", and "means of production", and if this is so, the rights in Article 19(1)(*a*) to (*e*) would have no relevance and are inapplicable.

---

[47] 1951 SCR 682 : AIR 1951 SC 318 : 1951 SCJ 478 : 52 Cri LJ 1361.

1204. With respect to the exclusion of Article 31 by Article 31-C, clause (1) of Article 31 is not in fact affected by Article 31-C, because under the latter any rights affected must be by law only. Even if Article 31-C was enacted for making laws in the furtherance of the directive principles in Article 39(*b*) and (*c*) affecting property, those laws have to conform to Article 31(1) for they would be laws depriving persons of their property. Article 31-C also contemplates the making of a law to give effect to the Directives in Article 39(*b*) and (*c*). In so far as Article 31(2) is concerned, Section 2 of the Twenty-fifth Amendment has already abridged the right contained in Article 31(2) and a further abridgment of this right authorised by Article 31-C may amount in a given case to the destruction or abrogation of that right and it may then have to be considered in each case whether a particular law provides for such an amount for the acquisition or requisitioning of the property in question as would constitute an abrogation or the emasculation of the right under Article 31(2) as it stood before the Constitution (Twenty-fifth) Amendment.

1205. On the fourth element, I agree with the reasoning and conclusion of my learned brother Khanna, J., whose judgment I have had the advantage of perusing, in so far as it relates only to the severance of the part relating to the declaration, and with great respect I also adopt the reasoning on that aspect alone as an additional reason for supporting my conclusions on the first three elements also.

1206. If the first part of Article 31-C is read in this manner, then it may be held to be *ultra vires* the amending power only if those portions of the article which make it *ultra vires* the amending power are severed from the rest of it. The portions that may have to be severed are the words, "is inconsistent with or takes away, or" and the words "Article 14" and the part dealing with the declaration by reason of which judicial review is excluded. The severability of these portions is permissible in view of the decision of the

Privy Council in *Punjab Province* v. *Daulat Singh and Others*,[48] and the principles laid down by this Court in *R. M. D. Chamarbaugwalla* v. *The Union of India*.[49]

1207. The doctrine that the general words in a statute ought to be construed with reference to the powers of the Legislature which enacts it, and that the general presumption is that the Legislature does not intend to exceed its jurisdiction, is well established. *In Re The Hindu Women's Rights to Property Act*,[50] and in *Daulat Singh's case* (supra), it has been held that on the general presumption the Legislature does not intend to exceed its jurisdiction, and that the Court could severe that part of the provision in excess of the power if what remained could be given effect to. In the former case, the Act being a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief was given the beneficial interpretation (See the observations of Gwyer, C. J. at p. 31). In the latter case, the provisions of Section 13-A of the Punjab Alienation of Land Act, 1900, which were added by Section 5 of the Punjab Alienation of Land (Second Amendment) Act No. X of 1938, providing for the avoidance of benami transactions as therein specified which were entered into either before or after the commencement of the Act of 1938, and for recovery of possession by the alienor would have been *ultra vires* the Provincial Legislature as contravening sub-section (1) of Section 298 of the Government of India Act, 1935, in that in some cases Section 13-A would operate as a prohibition on the ground of descent alone, but it was authorised and protected from invalidity as regards future transactions by sub-section (2)(*a*) of Section 298 of the Act of 1935 as amended by Section 4 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942. As the provisions of Section 31-A would have been *ultra vires* and void in so far as they purported to operate retrospectively, the Privy Council severed the retrospective element by the deletion of the words "either before or" in the section and the rest of the section was left to operate validly. Lord Thankerton, delivering the opinion of the Privy Council, observed at pp. 19-20.

> "It follows, in the opinion of their Lordships, that the impugned Act, so far as retrospective, was beyond the legislative powers of the Provincial Legislature and, if the retrospective element were not severable from the rest of the provisions, it is established beyond controversy that the whole Act would have to be declared *ultra vires* and void. But, happily, the retrospective element in the impugned Act is easily severable, and by the deletion of the words "either before or" from Section 5 of the impugned Act, the rest of the provisions of the impugned Act may be left to operate validly."

In *Chamarbaugwalla's case* (supra), Venkatarama Aiyar, J., after referring to the various cases including *F. N. Balsara's case* (supra), accepted the principle that when a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the Legislature or by reason of its provisions contravening constitutional prohibitions. He enunciated seven rules of separability. In *F. N. Balsara's case* (supra), apart from Section 23(*a*) and (*b*) and Section 24(1)(*a*) relating to commendation and incitement from the definition of the word 'liquor' in Section 2(24)(*a*) the words "all liquids consisting of or containing alcohol" were severed as these would include medicinal preparations. It will be seen that neither the whole sub-clause (*a*) was deleted nor the whole of clause (24) was separated. It is only the above words that were severed and held to make the remaining part of the definition valid.

---

[48] (1946) 73 Indian Appeals 59: 1946 FCR 1: AIR 1946 PC 66.

[49] 1957 SCR 930: AIR 1957 SC 628: 1957 SCJ 593.

[50] 1941 FCR 12: AIR 1941 FC 72.

1208. In *Corporation of Calcutta* v. *Calcutta Tramways Co. Ltd.*,[51] the question was whether Section 437(1)(*b*) of the Calcutta Municipal Act, 1951, was invalid under Article 19(1)(*g*) in so far as it made the opinion of the Corporation conclusive and non-challengeable in any court. The sub-clause (*b*) of Section 437(1) reads as follows:

> "Any purpose which is, in the opinion of the Corporation (which opinion shall be conclusive and shall not be challenged in any court) dangerous to life, health or property, or likely to create a nuisance."

This Court held the portion in the parenthesis as violative of Article 19(1)(*g*). It was contended that the above portion in the sub-clause was inextricably mixed up with the rest and hence cannot be separated. The Court held that the third proposition in the *Chamarbaugwalla's case* (supra), namely, that even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole, was inapplicable, Wanchoo, J., expressed the view that the parenthetical clause consisting of the words "which opinion shall be conclusive and shall not be challenged in any court" is severable from the rest of the clause referred to above.

1209. In the case of *Kameshwar Prasad* v. *State of Bihar*,[52] Rule 4-A of the Bihar Government Servants Conduct Rules, 1956, had provided that "No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service". The Court held the rule violative of Article 19(1)(*a*) and (*b*) in so far as it prohibited any form of demonstration, innocent or otherwise, and as it was not possible to so read it as to separate the legal from the unconstitutional portion of the provision, the entire rule relating to participation in any demonstration must be declared as *ultra vires*. The court, however, did not strike down the entire Rule 4-A but severed only that portion which related to demonstration from the rest of it, and the portion dealing with the strike which was upheld continued to exist after severing the above portion. However, in *State of Madhya Pradesh* v. *Ranojirao Shinde and Another*,[53] the doctrine of severability was not applied. In that case the term 'grant' was defined in Section 2(1) of the Madhya Pradesh Abolition of Cash Grants Act, 1963, in a language which was wide without making a distinction between various types of cash grants. This Court did not find any basis for severing some out of the several grants included therein and hence expressed the view that it is impermissible to rewrite that clause and confine the definition to such of the cash grants which the Legislature might be competent to abolish. The case is, therefore, distinguishable as the rule is inapplicable to such instances.

1210. I have considered the validity of Article 31-C by applying the doctrine of severability although neither side dealt with this aspect in relation to Article 31-C because both had taken an extreme position, which if accepted, will either result in the total invalidation or in upholding its validity in entirety. If as the petitioner had contended that by an amendment any of the fundamental rights cannot be damaged or destroyed, the next logical step of the argument on his behalf should have been to establish that the entire Article 31-C is bad on that account, and if not, to what extent it would have been sustained by applying the doctrine of severability particularly when the severability of the declaration part of Article 31-C was very much in the forefront during the arguments. Likewise the respondents knowing what the petitioner's case is, should have examined and submitted to what extent Article 31-C is invalid on the petitioner's argument. When a question was asked on February 19, 1973 that "if once it is conceded that a Constitution cannot be abrogated, then what one has to find out is to what extent an amendment goes to abrogation" and the answer was that "the whole of the Constitution cannot "be amended", and also when a question was raised that on the language of Article 31-C it appears to be ineffective, neither side advanced any argument on this aspect. Nor when the question of severability of the declaration portion was mooted on several occasions during the arguments was any submission made by either party as to whether such a severance is, or is not, possible. In the circumstances, the court is left to itself to examine and consider what is the correct position in the midst of these two extremes. In a case of constitutional amendment which has been enacted after following the form and manner prescribed in Article 368, as I said earlier, it should not be held invalid, if it could be upheld even by severing the objectionable part, where the valid part can stand on its own. It is not always in public interest to confine the consideration of the validity of a constitutional amendment to the arguments, the parties may choose to advance, otherwise we will be constrained to interpret a Constitution only in the light of what is urged before us, not what we understand it to be is the true nature of the impugned amendment. Happily, even if I am alone in this view, the portions indicated by me are severable, leaving the unsevered portion operative and effective so as to enable laws made under Article 31-C to further the directives of State policy enshrined in Article 39(*b*) and (*c*). In the view I have entertained, the words "inconsistent with or takes away or" and the words "Article 14" as also the portion "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" being severable, be deleted from Article 31-C. In the result, on the construction of Article 31-C after severing the portions indicated above, I hold Section 3 of the Twenty-fifth Amendment valid.

---

[51] (1964) 5 SCR 25: AIR 1964 SC 1279: (1964) 2 Cri LJ 354.

[52] 1962 Supp 3 SCR 369: AIR 1962 SC 1166: (1962) 1 Lab LJ 294.

[53] (1968) 3 SCR 489: AIR 1968 SC 1053: (1968) 2 SCJ 760.

1211. On the validity of the Constitution (Twenty-ninth) Amendment, my Lord the Chief Justice has come to the conclusion that notwithstanding this amendment the Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them and whether they effect reasonable abridgments in public interest, and if they take away, they will have to be struck down. My learned brothers Hegde and Mukherjea, JJ., have in effect come to the same conclusion, when they hold that this amendment is valid, but whether the Acts which were brought into the Ninth Schedule by that Amendment or any provision in any of them abrogate any of the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is gone into. With respect, I agree in effect with these conclusions which are consistent with the view I have expressed in respect of Articles 31-A and 31-B. I also agree that the contention of the learned Advocate for the petitioner that Article 31-B is intimately connected with Article 31-A is unacceptable and must be rejected for the reasons given in these judgments. The question whether fundamental rights are abrogated or emasculated by any of the Acts or provisions of these Acts included by the impugned Amendment, will be open for examination when the validity of these Acts is gone into, and subject to this reservation, I hold the Constitution (Twenty-ninth) Amendment valid.

1212. I now state my conclusions which are as follows—

(1) On the construction placed on Articles 12, 13 and other provisions of Part III and Article 368, Article 13(2) does not place an embargo on Article 368, for amending any of the rights in Part III, and on this view it is unnecessary to decide whether the leading majority judgment in *Golaknath case* (supra) is right in finding the power of amendment in the residuary Entry 97 of List I of Schedule VII, nor is it called for, having regard to the majority decision therein that the power of amendment is to be found in Article 368 itself.

(2) *Twenty-fourth Amendment.*—The word 'amendment' in Article 368 does not include repeal. Parliament could amend Article 368 and Article 13 and also all the fundamental rights and though the power of amendment is wide, it is not wide enough to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution. Parliament cannot under Article 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution, and on the construction placed by me, the Twenty-fourth Amendment is valid, for it has not closed the nature and scope of the amending power as it existed before the Amendment.

(3) *Twenty-fifth Amendment*:

(*i*) Section 2.

(*a*) *Clause (2) to Article 31 as substituted.*—Clause (2) of Article 31 has the same meaning and purpose as that placed by this Court in the several decisions referred to except that the word 'amount' has been substituted for the word 'compensation', after which the principle of equivalent in value or just equivalent of the value of the property acquired no longer applies. The word 'amount' which has no legal concept and, as the amended clause indicates, it means only cash which would be in the currency of the country, and has to be fixed on some principle. Once the court is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or illusory or where the principles upon which it is fixed are found to bear reasonable relationship to the value of the property acquired, the court cannot go into the question of the adequacy of the amount so fixed or determined on the basis of such principles.

(*b*) *Clause* (*2-B*) *as added.*—On the applicability of Article 19(1)(*f*) to clause (2) of Article 31 the word 'affect' makes two constructions possible *firstly*, that Article 19(1)(*f*) will not be available at all to an expropriated owner, and this, in other words, means that it totally abrogates the right in such cases, and secondly, clause (2-B) was intended to provide that the law of acquisition or requisition will not be void on the ground that it abridges or affects the right under Article 19(1)(*f*). The second construction which makes the amendment valid is to be preferred, and that clause (2-B) by the adoption of the doctrine of severability in application is restricted to abridgment and not abrogation destroying or damaging the right of reasonable procedure in respect of a law of acquisition or requisition for the effective exercise of the right under Article 31(2); for, a reasonable notice, a hearing, opportunity to produce material and other evidence, may be necessary to establish that a particular acquisition is not for public purpose and for providing the value of the property and other matters that may be involved in a particular principle adopted in fixing the amount or for showing that what is being paid is illusory, arbitrary etc. Therefore, in the view taken, and for the reasons set out in this judgment, Section 2 of the Twenty-fifth Amendment is valid.

(*ii*) *Section 3 of the Twenty-fifth Amendment.*—New Article 31-C is only valid if the words "inconsistent" with or takes away or", the words "Article 14" and the declaration portion "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy", are severed, as in my view they are severable. What remains after severing can be operative and effective on the interpretation given by me as to the applicability of Articles 19 and 31, so as to enable laws made under Article 31-C to further the directives enshrined in Article 39(*b*) and (*c*). In the result on the construction of Article 31-C, after severing the portions indicated above, I hold Section 3 of the Twenty-fifth Amendment valid.

(4) *Twenty-ninth Amendment.*—The contention that Articles 31-A and 31-B are inter-connected is unacceptable and is rejected. The Constitution (Twenty-ninth) Amendment is valid, but whether any of the Acts included thereby in Schedule IX abrogate, emasculate, damage or destroy any of the fundamental rights in Part III or the basic elements or essential features of the Constitution will have to be examined when the validity of those Acts is challenged.

1213. The petitions will now be posted for hearing before the Constitution Bench for disposal in accordance with the above findings. In the circumstances the parties will bear their own costs.

SCC Online

Palekar, J.—The facts leading to this petition have been stated in the judgment delivered by my lord the Chief Justice and it is not therefore necessary to recount the same.

1215. In this petition the constitutional validity of the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 has been challenged. As the petitioner apprehended that he would not succeed in the challenge in view of the recently passed Constitution Amendment Acts, he has also challenged the validity of these Acts. They are: (1) The Constitution 24th Amendment Act, 1971; (2) The Constitution 25th Amendment Act, 1971 and (3) The Constitution 29th Amendment Act, 1972. The crucial point involved is whether the Constitution is liable to be amended by the Parliament so as to abridge or take away fundamental rights conferred by Part III of the Constitution.

1216. By the 24th Amendment, some changes have been made in Articles 13 and 368 with the object of bringing them in conformity with the views expressed by a majority of Judges of this Court with regard to the scope and ambit of Articles 13 and 368. In *Sankari Prasad Singh* v. *Union of India*,[54] the Constitutional Bench of five Judges of this Court unanimously held that fundamental rights could be abridged or taken away by an amendment of the Constitution under Article 368. In the next case of *Sajjan Singh* v. *State of Rajasthan*,[55] a majority of three Judges expressed the view that *Sankari Prasad's case* (supra) was correctly decided. Two Judges expressed doubts about that view but considered that it was not necessary to dissent from the decision as the point was not squarely before the court. In the third case namely *Golak Nath* v. *State of Punjab*,[56] the view taken in the earlier cases by eight Judges was overruled by a majority of six Judges to five. The majority held that Parliament had no power to amend the Constitution under Article 368 so as to abridge or take away the fundamental rights, one of them (Hidayatullah, J.), who delivered a separate judgment, expressing the view that this could not be done even by amending Article 368 with the object of clothing the Parliament with the necessary powers. In this state of affairs the Union Government was obliged to take a definite stand. It would appear that the Union Government and the Parliament agreed with the view taken in *Sankari Prasad's case* (supra) by the majority in *Sajjan Singh's case* (supra) and the substantial minority of Judges in *Golak Nath's case* (supra). They were out of sympathy with the view adopted by the majority in *Golak Nath's case* (supra). Hence the 24th Amendment. That amendment principally sought to clarify what was held to be implicit in Articles 13 and 368 by a majority of Judges of this Court over the years, namely: (1) that nothing in Article 13 applied to an amendment to the Constitution made under Article 368; (2) that Article 368 did not merely lay down the procedure for a constitutional amendment but also contained the power to amend the Constitution; (3) that the Parliament's power under Article 368 was a constituent power as distinct from legislative power; (4) that this power to amend included the power to amend by way of addition, variation or repeal of any provision of the Constitution.

1217. After passing the 24th Amendment the other two amendments were passed in accordance with the Constitution as amended by the 24th Amendment.

---

54. 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

55. (1965)1 SCR 933: AIR 1965 SC 845: (1965)1 SCJ 377.

56. (1967) 2 SCR 762: AIR 1967 SC 1643: (1967)2 SCJ 486.

1218. In his argument before us Mr. Palkhivala, appearing on behalf of the petitioner, supported the majority decision in *Golak Nath case* (supra) with supplemental arguments. In any event, he further contended, the power of Parliament to amend the Constitution under Article 368 did not extend to the damaging or destroying what he called the essential features and basic principles of the Constitution and since fundamental rights came in that category, any amendment which damaged or destroyed the core of these rights was impermissible. The argument on behalf of the State of Kerala and the Union of India was that an amendment of the Constitution abridging or taking away fundamental rights was not only permissible after the clarificatory 24th Amendment but also under the unamended Articles 13 and 368, notwithstanding the refinement in the arguments of Mr. Palkhivala with regard to essential features and basic principles of the Constitution. We are, therefore, obliged to go back to the position before the 24th Amendment and consider whether the majority view in *Golak Nath case* (supra) was not correct. A fuller bench of 13 Judges was, therefore, constituted and it will be our task to deal with the crucial question involved. This course cannot be avoided, it is submitted, because if the fundamental rights were unamendable by the Parliament so as to abridge or take them away, Parliament could not increase its power to do so by the device of amending Articles 13 and 368—whether one calls that amendment clarificatory or otherwise. The real question is whether the Constitution had granted Parliament the power to amend the Constitution in that respect, because, if it did not, no amendment of Articles 13 and 368 would invest the Parliament with that power. We have, therefore, to deal with the Constitution as it obtained before the 24th Amendment.

1219. Since fundamental questions with regard to the Constitution have been raised, it will be necessary to make a few prefatory remarks with regard to the Constitution. The Constitution is not an indigenous product. Those who framed it were, as recognised by this Court in *The Automobile Transport (Rajasthan) Ltd.* v. *The State of Rajasthan and Others*,[57] thoroughly acquainted with the Constitutions and constitutional problems of the more important countries in the world, especially, the English-speaking countries. They knew the Unitary and Federal types of Constitutions and the Parliamentary and Presidential systems of Government. They knew what constitutions were regarded as "flexible" constitution and what constitutions were regarded as "rigid" constitutions. They further knew that in all modern written constitutions special provision is made for the amendment of the Constitution. Besides after the Government of India Act, 1935 this country had become better acquainted at first hand, both with the Parliamentary system of Government and the frame of a Federal constitution with distribution of powers between the Centre and the States. All this knowledge and experience went into the making of our Constitution which is broadly speaking a quasi-Federal constitution which adopted the Parliamentary system of Government based on adult franchise both at the Centre and in the States.

1220. The two words mentioned above 'flexible' and 'rigid' were first coined by Lord Bryce to describe the English constitution and the American constitution respectively. The words were made popular by Dicey in his *Law of the Constitution* first published in 1885. Many generations of lawyers, thereafter, who looked upon Dicey as one of the greatest expositors of the law of the constitution became familiar with these words. A 'flexible' constitution is one under which every law of every description (including one relating to the constitution) can legally be *changed* with the same ease and in the same manner by one and the same body. A 'rigid' constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. See: Dicey's *Law of the Constitution,* 10th edition, 1964, p. 127. It will be noted that the emphasis is on the word 'change' in denoting the distinction between the two types of constitutions. Lord Birkenhead in delivering the judgment of the Judicial Committee of the Privy Council in *McCawley* v. *The King*[58] used the words 'uncontrolled' and 'controlled' for the words 'flexible' and 'rigid' respectively which were current then. He had to examine the type of constitution Queensland possessed, whether it was a 'flexible' constitution or a 'rigid' one in order to decide the point in controversy. He observed at page 703 'The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality and in some cases by a specially convened assembly'. He had to do that because the distinction between the two types of constitutions was vital to the decision of the controversy before the Privy Council. At page 704 he further said 'Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a 'controlled' and the other an 'uncontrolled' constitution as by any other nomenclature'. Perhaps this was an apology for not using the words 'rigid' and 'flexible' which were current when he delivered the judgment. In fact, Sir John Simon in the course of his arguments in that case had used the words 'rigid' and 'flexible' and he had specifically referred to Dicey's *Law of the Constitution.* Strong in his text-book on *Modern Political Constitutions,* Seventh revised edition, 1966—reprinted in 1970 says at p. 153 "The sole criterion of a rigid constitution is whether the Constituent Assembly which drew up the Constitution left any special directions as to how it was to be changed. If in the Constitution there are no such directions, or if the directions explicitly leave the Legislature a free hand, then the Constitution is 'flexible'."

---

[57] (1963)1 SCR 491 at pp. 539-540: AIR 1962 SC 1406.

1221. The above short disquisition into the nature of constitutions was necessary in order to show that when our Constitution was framed in 1949 the framers of the constitution knew that there were two contrasted types of democratic constitutions in vogue in the world—one the 'flexible' type which could be amended by the ordinary procedure governing the making of a law and the other the 'rigid' type—which cannot be so amended but required a special procedure for its amendment. Which one of these did our framers adopt—the 'flexible' or the 'rigid'? On an answer to the above question some important consequences will follow which are relevant to our enquiry.

1222. Our Constitution provides for a Legislature at the Centre and in the States. At the Centre it is the Parliament consisting of the Lok Sabha and the Rajya Sabha. In the States the Legislature consists of the State Assembly and, in some of them, of an Upper Chamber known as the Legislative Council. Legislative power is distributed between the Centre and the States, Parliament having the power to make laws with regard to subject-matters contained in List I of the Seventh Schedule and the Stat

---

[58] 1920 AC 691.

Legislatures with regard to those in List II. There is also List III enumerating matters in respect of which both the Parliament and the State Legislatures have concurrent powers to make laws. This power to make laws is given to these bodies by Articles 245 and 248 and the law-making procedure for the Parliament is contained in Articles 107 to 122 and for the State Legislatures in Articles 196 to 213. The three Lists in the Seventh Schedule no where mention the 'Amendment of the Constitution' as one of the subject-matters of legislation for either the Parliament or the State Legislatures. On the other hand, after dealing with all important matters of permanent interest to the Constitution in the First XIX parts covering 367 Articles, the Constitution makes special provision for the 'Amendment of the Constitution' in Part XX in one single Article, namely, Article 368. A special procedure is provided for amendment which is not the same as the one provided for making ordinary laws under Articles 245 to 248. The principle features of the legislative procedure at the Centre are that the law must be passed by both Houses of Parliament by a majority of the members present and voting in the House, and in case of an impasse between the two Houses of Parliament, by a majority vote at a joint sitting. All that is necessary is that there should be a quorum which we understand is 10% of the strength of the House and if such a quorum is available the two Houses separately or at a joint meeting, as the case may be, may make the law in accordance with its legislative procedure laid down in Articles 107 to 122. The point to be specially noted is that all ordinary laws which the Parliament makes in accordance with Articles 245 to 248 must be made in accordance with this legislative procedure and no other. Under Article 368 however, a different and special procedure is provided for amending the Constitution. A Bill has to be introduced in either House of Parliament and must be passed by each House separately by a special majority. It should be passed not only by 2/3rd majority of the members present and voting but also by a majority of the total strength of the House. No joint sitting of the two Houses is permissible. In the case of certain provisions of the Constitution which directly or indirectly affect inter-state relations, the proposed amendment is required to be ratified by the Legislatures—which is not a legislative process—of not less than one-half of the States before the Bill proposing the amendment is presented to the President for his assent. The procedure is special in the sense that it is different and more exating or restrictive than the one by which ordinary laws are made by Parliament. Secondly in certain matters the State Legislatures are involved in the process of making the amendment. Such partnership between the Parliament and the State Legislatures in making their own laws by the ordinary procedure is not recognised by the Constitution. It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a 'rigid' or 'controlled' constitution because the Constituent Assembly has "left a special direction as to how the Constitution is to be changed". In view of Article 368, when the special procedure is successfully followed, the proposed amendment automatically becomes a part of the Constitution or, in other words, it writes itself into the Constitution.

1223 The above discussion will show that the two separate procedures—one for law-making and the other for amending the constitution—were not just an accident of drafting. The two procedures have been deliberately provided to conform with well-known constitutional practices which make such separate provisions to highlight the different procedures—one commonly known as the legislative procedure and the other the constituent procedure. The word 'constituent' is so well-known in Modern Political

Constitutions that it is defined in the dictionaries as 'able to frame or *alter* a constitution'. And the power to frame or alter the constitution is known as constituent power. See: *The Concise Oxford Dictionary*.

1224. Where then in our Constitution lie the legislative power and the constituent power? The legislative power is given specifically by Articles 245 to 248, subject to the Constitution, and these Articles are found under the heading 'Distribution of legislative powers'. That alone is enough to show that these articles do not deal with the constituent power. The point is important because the leading majority judgment in *Golak Nath's case* (supra) proceeds on the footing that the power lies in Article 248 read with the residuary Entry 97 in List I of the Seventh Schedule. That finding was basic to the decision because unless an amendment of the Constitution is equated with a law made by Parliament under one or the other of the entries in List I of the Seventh Schedule it was not easy to invoke the bar of Article 13(2). Mr. Palkhivala says that he is indifferent as to whether the power is found in Article 248 or elsewhere. But that does not conclude the question because if we agree with the view that it falls in Article 248 the decision that an amendment abridging or taking away fundamental rights, being a law, under Article 248, would be barred by Article 13(2) would be unassailable.

1225. In *Golak Nath's case* (supra) Subba Rao, C. J, who spoke for himself and his four learned colleagues held that the power to amend the Constitution was not found in Article 368 but in Article 248 read with the residuary Entry 97 of List I of the Seventh Schedule. The five learned Judges who were in a minority held that the power is in Article 368. Hidayatullah, J., on the other hand, held that Article 368 did not give the power to any particular person or persons and that if the named authorities acted according to the law of the Article, the result of amendment was achieved. And if the procedure could be deemed to be a power at all it was a legislative power, *sui generis*, to be found outside the three lists in Schedule seven of the Constitution. In other words, six learned Judges did not find the power in the residuary Entry 97 of List I, while five found it there. We have, therefore, to see whether the view of Subba Rao, C. J., and his four colleagues who held that the power lay in Article 248 read with the residuary Entry 97 is correct. In my view, with respect, it is not.

1226. Article 368 is one single article in Part XX entitled 'The amendment of the Constitution'. It is a special topic dealt with by that Part. In other articles like Articles 4, 169, Para 7 of Schedule V and Para 21 of Schedule VI a power is granted to the Parliament to amend specific provisions 'by law', i. e. by adopting the ordinary procedure of legislation, though it altered certain provisions of the Constitution. The alterations are 'a law' made by the Parliament and, therefore, liable to be struck down, unless specifically saved, in case of inconsistency with the provisions of the Constitution. Secondly in every such case a provision is deliberately added explaining that the amendment so made by law is not to be deemed an amendment of the Constitution for the purpose of Article 368. The warning was necessary to emphasize that an amendment of the Constitution in accordance with the procedure laid down in Article 368 was of a special quality—a quality different from amendments made 'by law' by the Parliament. The special quality flowed from the fact that the Parliament and the States which were to participate in the process performed not their ordinary legislative function but a special function known in all Federal or quasi-federal controlled Constitutions as a 'constituent' function. The difference between the ordinary function of making law and the function of amending the constitution loses its significance in the case of a sovereign body like the British Parliament or a Parliament like that of New Zealand which has a written Constitution of the Unitary type. These bodies can amend a constitutional law with the same ease with which they can make an ordinary law. The reason is that their Constitutions are 'flexible' constitutions. But in countries which have a written Constitution which is a 'rigid' or 'controlled' Constitution the Constitution is liable to be amended only by the special procedure, and the body or bodies which are entrusted with the amendment of the Constitution are regarded as exercising constituent power to distinguish it from the power they exercise in making ordinary legislation under the Constitution. So far as we are concerned, our Constitution gives specific powers of ordinary legislation to the Parliament and the State Legislatures in respect of well demarcated subjects. But when it comes to the amendment of the Constitution, a special procedure has been prescribed in Article 368. Since the result of following the special procedure under the Article is the amendment of the constitution the process which brings about the result is known as the exercise of constituent power by the bodies associated in the task of amending the constitution. It is, therefore, obvious, that when the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the Constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. Article 368 is not entirely procedural. Undoubtedly part of it is procedural. But there is a clear mandate that on the procedure being followed the proposed amendment shall become part of the Constitution, which is the substantive part of Article 368. Therefore, the peculiar or special power to amend the Constitution is to be sought in Article 368 only and not elsewhere.

1227. Then again if the constituent Assembly had regarded the power to amend the Constitution as no better than ordinary legislative power the framers of the Constitution who were well-aware of the necessity to provide for the power to amend the constitution would not have failed to add a specific entry to that effect in one or the other of the lists in the Seventh Schedule instead of leaving it to be found in a residuary entry. The very fact that the framers omitted to include it specifically in the list but provided for it in a special setting in Part XX of the Constitution is eloquent of the fact that the power was not to be sought in the residuary entry or the residuary Article 248. In this connection it may be recalled that in the Draft Constitution Article 304 had a separate provision in Clause 2. Clause 1 of that Article fairly corresponds with our present Article 368. In Clause 2 power was given to the States to propose amendments in certain matters and Parliament had to ratify such amendments. There was thus a reverse process of amendment. There was no residuary power in the States and the amendment of the Constitution was not a specific subject of legislative power in draft List II. This goes to show that in the Draft Constitution, in all but two matters, the proposal for amendment was to be made by the Parliament and in two specified matters by the State Legislatures. If the power for the latter two subjects was to be found in Clause 2 of Article 304 of the Draft Constitution it is only reasonable to hold that the power of Parliament to amend the rest of the Constitution was to be found in Article 304(1) which corresponds to the present Article 368.

1228. Moreover the actual wording of Article 245 which along with Articles 246 to 248 comes under the topic "Distribution of legislative powers" is important. Article 245 provides that Parliament may make laws for the whole or any part of India and the Legislature of a State may make laws for the whole or any part of the State. Thus Article 245 confers the power to make laws on Parliament and the Legislatures of the State for and within the territory allocated to them. Having conferred the power, Articles 246 to 248 distribute the subject-matters of legislation in respect of which the Parliament and the State Legislatures have power to make the laws referred to in Article 245. But there is an important limitation on this power in the governing words with which Article 245 commences. It is that the power was subject to the provisions of the Constitution thereby lifting the Constitution above the 'laws'. That would mean that the Parliament and State Legislatures may, indeed, make laws in respect of the areas and subject-matters indicated, but the exercise must be "subject to the provisions of the Constitution" which means that the power to make laws does not extend to making a law which contravenes or is inconsistent with any provision of the constitution which is the supreme law of the land. A law is inconsistent with the provision of the constitution when, being given effect to, it impairs or nullifies the provision of the constitution. Now no simpler way of impairing or nullifying the constitution can be conceived than by amending the text to the provision of the constitution. Therefore, since a law amending the text of a constitutional provision would necessarily entail impairing or nullifying the constitutional provison it would contravene or be inconsistent with the provision of the constitution and hence would be impermissible and invalid under the governing words "subject to the provisions of the constitution" in Article 245. It follows that a law amending the constitution if made on the assumption that it falls within the residuary powers of the Parliament under Article 248 read with Entry 97 of List I would always be invalid. Then again a law made under Articles 245 to 248 must, in its making, conform with the ordinary legislative procedure for making it laid down for the Parliament in Part V, Chapter II and for the State Legislature in Part VI, Chapter III of the constitution and, no other. To say that the power to make law lies in Article 245 and the procedure to make it in Article 368 is to ignore not only this compulsion, but also the fundamental constitutional practice followed in our Constitution, as in most modern controlled constitutions, prescribing special procedure for the amendment of the constitution which is different from the procedure laid down for making ordinary laws. The conclusion, therefore, is that the power of amendment cannot be discovered in Article 248 read with the residuary entry. The argument that Article 368 does not speak of the power to amend but only of the procedure to amend in pursuance of the power found elsewhere is clearly untenable. The true position is that the alchemy of the special procedure prescribed in Article 368 produces the constituent power which transports the proposed amendment into the constitution and gives it equal status with the other parts of the constitution.

1229. Moreover, if an amendment of the constitution is a law made under Article 248 read with Entry 97, List I strange results will follow. If the view taken in *Golak Nath's case* (supra) is correct, such 'a law' being repugnant to Article 13(2) will be expressly invalidated so far as Part III of the constitution is concerned. And such a law amending any other article of the constitution will also be invalid by reason of the governing words "subject to the provisions of this constitution" by which Article 245 commences. In that event no article of the constitution can be amended. On the other hand, if the law amending an article of the constitution is deemed to be not repugnant to the article which is amended, then every article can be amended including those embodying the fundamental rights without attracting the bar of Article 13(2) which can only come in on a repugnancy. On the argument, therefore, that an amendment is a law made under Article 248 the whole of the constitution becomes unamendable, and on the argument that such a law never becomes repugnant to the article amended the whole of the constitution becomes amendable, in which case, we are unable to give any determinate value to Article 13(2). Instead of following this complicated way of tracing the power in Article 248 read with the residuary Entry 97 of List I it would be correct to find it in Article 368 because that is a special article designed for the purposes of the amendment of the constitution which is also the subject heading of Part XX. In my opinion, therefore, the power and the procedure to amend the constitution are in Article 368.

1230. The next question which requires to be examined in the nature of this constituent power, specially in the case of 'controlled' or 'rigid' constitutions. A student of Modern Political Constitutions will find that the methods of modern constitutional amendment are: (1) by the ordinary Legislature but under certain restrictions; (2) by the people through a referendum; (3) by a majority of all the unions of a Federal State; (4) by special convention; and (5) by a combination of two or more of the above methods which are mentioned in order of increasing rigidity as to the method. Where the power of amending the constitution is given to the legislature by the Constituent Assembly the Legislature working under restrictions assumes a special position. Strong in the book, already referred to, observes at page 152. "The constituent assembly, knowing that it will disperse and leave the actual business of legislation to another body, attempts to bring into the constitution that it promulgates as many guides to future action as possible. If it wishes, as it generally does, to take out of the hands of the ordinary Legislature the power to alter the constitution by its own act, and since it cannot possibly foresee all eventualites, it must arrange for some method of amendment. *In short, it attempts to arrange for the recreation of a constituent assembly whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting* under certain restrictions." (emphasis supplied)

1231. Authorities are not wanting who declare that such amending power is sovereign constituent power. Orfield in his book, *The Amending of the Federal Constitution,* (1942), page 155 (1971 Edn.) says that in America the amending body is sovereign in law and in fact. Herman Finer in his book *The Theory and Practice of Modern Government,* fourth edition, 1961 reprinted in 1965, pages 156-157 says "Supremacy is shown and maintained chiefly in the amending process.................Too difficult a process, in short, ruins the ultimate purpose of the amending clause.................The amending clause is so fundamental to a constitution that I am tempted to call it the constitution itself". Geoffery Marshall in his *Constitutional Theory* (1971), p. 36 says "there will in most constitutional systems, be an amending process and some 'collection' of persons, possibly complex, in whom sovereign authority to alter any legal rule inheres...................Constitutions unamendable in all or some respects are non-standard cases and a sovereign entity whether (as in Britain) a simple legislative majority, or a complex specially convened majority can be discovered and labelled "sovereign" in almost all systems". Wade in his *Introduction to Dicey's Law of the Constitution,* 10th edition says as follows at page xxxvii "Federal government is a system of government which embodies a division of powers between a central and a number of regional authorities. Each of these "in its own sphere is co-ordinate with the others ;and independent of them". This involves a division of plenary powers and such a division is a negation of sovereignty. Yet somewhere lies the power to change this division. Wherever that power rests, there is to be found legal sovereignty". Having regard to this view of the jurists, it was not surprising that in *Sankari Prasad's case* (supra) Patanjali Shastri, J., speaking for the court, described the power to amend under Article 368 as "sovereign constituent power" (p. 106). By describing the power as "sovereign constituent power" it is not the intention here to declare, if somebody is allergic to the idea, that legal sovereignty lies in this body or that. It is not necessary to do so for our immediate purpose. The word 'sovereign' is used as a convenient qualitative description of the power to highlight its superiority over other powers conferred under the constitution. For example, legislative power is subject to the constitution but the power to amend is not. Legislative activity can operate only *under* the constitution but the power of amendment operates *over* the constitution. The word 'sovereign', therefore, may, for our purpose, simply stand as a description of a power which is superior to every one of the other powers granted to its instrumentalities by the constitution.

1232. The amplitude and effectiveness of the constituent power is not impaired because it is exercised by this or that representative body or by the people in a referendum. One cannot say that the power is less when exercised by the ordinary legislature as required by the constitution or more when it is exercised—say by a special convention. This point is relevant because it was contended that our Parliament is a constituted body—"a creature of the constitution" and cannot exercise the power of amending the constitution to the same extent that a constituent assembly specially convened for the purpose may do. It was urged that the sovereignty still continues with the people and while it is open to the people through a convention or a constituent assembly to make any amendments to the constitution in any manner it liked, there were limitations on the power of an ordinary Parliament—'a constituted body', which precluded it from making the amendments which damaged or destroyed the essential features and elements of the constitution. We shall deal with the latter argument in its proper place. But for the present we are concerned to see whether the power to amend becomes more or less in content according to the nature of the body which makes the amendment. In my view it does not. Because as explained by Strong in the passage already quoted "In short it (i.e. the constituent assembly which framed the constitution) attempts to arrange for the recreation of a constituent assembly whenever such matters are in future to be considered even though that assembly be nothing more than the ordinary legislature acting under certain restrictions". Only the methods of making amendments are less rigid or more rigid according to the historical or political background of the country for which the constitution is framed. For example Article V of the American Constitution divides the procedure for formal amendment into two parts—proposal and ratification. Amendments may be proposed in two ways: (1) by two-thirds vote of both Houses of Congress; (2) by national constitutional conventions called by Congress upon application of two-thirds of the State Legislatures. Amendments may be ratified by two methods: (1) by the legislatures of three-fourths of the States; (2) by special conventions in three-fourths of the States. Congress has the sole power to determine which method of ratification is to be used. It may direct that the ratification may be by the State legislatures or by special conventions

1233. One thing which stands out so far as Article V is concerned is that referendum as a process of constitutional amendment has been wholly excluded. In fact it was held by the Supreme Court of America in *Dodge v. Woolsey*[59] "the constitution is supreme over the people of the United

---

[59] (1855) 18 How 331 at 348.

States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them". In other words, the people, having entrusted the power to amend the constitution to the bodies mentioned in Article V, had completely withdrawn themselves from the amending process. Out of the two combinations of the bodies referred to in Article V—one is a combination of the Congress and the State Legislatures and between them, though they are constituted bodies, they can qualitatively amend the constitution to the same extent as if the proposal made by the Congress was to be ratified by convention by 3/4th number of States. As a matter of fact on the proposal made by the Congress all the amendments of the U. S. Constitution, with the exception of the twenty-first which repealed the 18th Amendment, have been ratified by State legislatures. Such an amendment accomplished by the participation of the Congress and the State Legislatures has not been held by the U. S. Supreme Court as being any less effective because the Congress had not obtained the ratification from a convention of the States. The question arose in *United States* v. *Sprague.*[60] That case was on the 18th (Prohibition) Amendment. The amendment became part of the constitution on a proposal by the Congress and ratification by the State Legislatures. Objection was raised to the validity of the amendment on the ground that since the amendment affected the personal liberty of the subject and under Article X the people had still retained rights which had not been surrendered to the Federal Constitution, the ratification ought to have been by the representatives of the people at a special convention and not by the State Legislatures. That objection was rejected on the ground that the Congress alone had the choice as to whether the State Legislatures or the conventions had to ratify the Amendment. Conversely, in *Hawke* v. *Smith*[61] which also related to the 18th amendment it was held that the State of Ohio could not provide for the ratification of the 18th Amendment by popular referendum since such a procedure altered the plain Language of Article V which provides for ratification by State legislatures rather than by direct action of the people. It will be seen from this case that the State legislature for Ohio, instead of deciding on the ratification itself as it was bound to do under Article V, decided to obtain the opinion of the people by a referendum but such a procedure was held to be illegal because it did not find a place in Article V. This establishes that an amendment of the constitution must be made strictly in accordance with the method laid down in the constitution and any departure from it even for the purpose of ascertaining the true wishes of the people on the question would be inadmissible. An amendment of the constitution must be made only in accordance with the procedure laid down in the Constitution and whatever individuals and bodies may think that it had better be made by a representative constituent assembly or a convention or the like is of really no relevance.

1234. Under Article 368 the Parliament is the principal body for amending the constitution except in cases referred to in the proviso. Parliament need not be associated with the State Legislatures in making an amendment of the constitution in cases excepted from the proviso. It cannot be lost sight of that Parliament in a very large way represents the will of the people. Parliament consists of two Houses—the Lok Sabha and the Rajya Sabha. The Lok Sabha is elected for five years on the basis of adult franchise.

---

[60] 282 US 716.

[61] 253 US 221.

The Rajya Sabha is a permanent body—members of which retire by rotation. The Rajya Sabha consists of members elected by the State Legislatures who are themselves elected to those Legislatures on the basis of adult franchise. Then again there is a striking difference between the position occupied by the Congress in relation to the President in United States and the position of the Executive in relation to the Parliament and the State Legislatures in India. In America the President is directly elected by the people for a term and is the Executive head of the Federal Government. The Congress may make laws but the President is not responsible to the Congress. In India, however, in our Parliamentary system of democracy, as in Great Britain, the Executive is entirely responsible to the Legislature. The Congress in U. S. A. will not be held responsibe by the people for what the President had done in his Executive capacity The same is true in respect of State Legislatures in America. In India people will hold the Parliament responsible for any executive action taken by the Cabinet. While in the context of a constitutional amendment it is facile to decry the position of Parliament as a constituent body, we cannot ignore the fact that in both Great Britain and New Zealand—one with an unwritten constitution and the other with a written constitution—governed by Parliamentary democracy, the constitution could be changed by an ordinary majority.

1235. Why the power to amend the constitution was given in the main to Parliament is not fully clear. But two things are clear. One is that as in America the people who gave us the constitution completely withdrew themselves from the process of amendment. Secondly, we have the word of Dr. Ambedkar—one of the principal framers of our Constitution that the alternative methods of referendum or convention had been considered and definitely rejected. (See *Constituent Assembly Debates,* Vol. VII, page 43). They decided to give the power to Parliament, and Dr. Ambedkar has gone on record as saying that the amendment of the constitution was deliberately made as easy as was reasonably possible by prescribing the method of Article 368. The Constituent Assembly Debates show that the chief controversy was as to the degree of flexibility which should be introduced into the constitution. There may have been several historical reasons for the constituent assembly's preference for Parliament. Our country is a vast continent with a very large population. The level of literacy is low and the people are divided by language, castes and communities not all pulling in the same direction. On account of wide-spread illiteracy, the capacity to understand political issues and to rise above local and parochial interests is limited. A national perspective had yet to be assiduously fostered. It was, therefore, inevitable that a body which represented all India leadership at the Centre should be the choice. Whatever the reasons, the Constituent Assembly entrusted the power of amendment to the Parliament and whatever others may think about a possible better way, that was not the way which the constituent assembly commanded. The people themselves having withdrawn from the process of amendment and entrusted the task to the Parliament instead of to any other representative body, it is obvious that the power of the authorities designated by the constitution for amending the constitution must be co-extensive with the power of a convention or a constituent assembly, had that course been permitted by the constitution.

1236. We have already shown that constituent power is qualitatively superior to legislative power. Speaking about the legislative competence of the Canadian Parliament, Viscount Sankey, L. C., speaking for the Judicial

Committee of the Privy Council observed in *British Coal Corporation* v. *The King*,[62] "Indeed, in interpreting a constituent or organic statute such as the Act (British North America Act) that construction most beneficial to the widest possible amplitude of its powers must be adopted". This principle has been again clearly laid down by the Judicial Committee in *Edwards* v. *Attorney-General for Canada*.[63] "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs". If that is the measure of legislative power the amplitude of the power to amend a constitution cannot be less.

1237. The width of the amending power can be determined from still another point of view. The Attorney-General has given to us extracts from nearly seventy-one modern constitutions of the world and more than fifty of them show that those constitutions have provided for their amendment. They have used the word 'amend', 'revise', or 'alter', as the case may be, and some of them have also used other variations of those words by showing that the constitutional provisions may be changed in accordance with some special procedures laid down. Some have made the whole of the constitution amendable; some others have made some provisions unamendable; and two constitutions—that of Somalia and West Germany have made provisions relating to Human Rights unamendable. In some of the constitutions a few provisions are made partially amendable and other provisions only under special restrictions. But all have given what is commonly known as the 'Amending power' to be exercised in circumstances of more or less rigidity. The methods or processes may be more rigid or less rigid—but the power is the same, namely, the amending power.

1238. The *raison'detre* for making provision for the amendment of the constitution is the need for orderly change. Indeed no constitution is safe against violent extra-constitutional upheavals. But the object of making such a provision in a constitution is to discourage such upheavals and provide for orderly change in accordance with the constitution. On this all the text books and authorities are unanimous. Those who frame a constitution naturally want it to endure but, however gifted they may be, they may not be able to project into the future, when, owing to internal or external pressures or the social, economic and political changes in the country, alterations would be necessary in the constitutional instrument responding all the time to the will of the people in changed conditions. Only thus an orderly change is ensured. If such a change of constitution is not made possible, there is great danger of the constitution being overtaken by forces which could not be controlled by the instruments of power created under the constitution. Wide-spread popular revolt directed against the extreme rigidity of a constitution is triggered not by minor issues but by major issues. People revolt not because the so-called 'unessential' parts of a constitution are not changed but because the 'essential' parts are not changed. The essential parts are regarded as a stumbling block in their progress to reform. It is, therefore, evident that if for any reason, whether it is the extreme rigidity of a constitution or the disinclination of those who are in power to introduce change by amendment, the essential parts looked upon with distrust by the people are not amended, the constitution has hardly a chance to survive against the will of the people. If the constitution is to endure it must necessarily respond to the will of the people by incorporating changes sought by the people. The survival of the American Constitution is generally attributed not so much to the amending Article V of the Constitution but to its vagueness which was exploited by the great judges of the Supreme Court of America who by their rulings adapted the constitution to the changing conditions. Legislative enactments, custom and usage also played a part. If the constitution were to merely depend upon constitutional amendments there are many who believe that the constitution would not have survived. The reason was the extreme rigidity of the process of amendment. But framers of modern constitutions as of India learning from experience of other countries have endeavoured to make their constitution as precise and as detailed as possible so that one need not depend upon judicial interpretation to make it survive. Correspondingly they have made it more flexible so that it is amenable to amendment whenever a change in the constitution is necessary.

---

[62] 1935 AC 500 at p. 518.

[63] 1930 AC 124, 136.

1239. A good deal of unnecessary dust was raised over the question whether the amendment of the constitution would extend to the repeal of the Constitution. That is an interesting subject for speculation by purists and theoretical jurists, but politicians who frame a constitution for the practical purposes of government do not generally concern themselves with such speculations. The pre-eminent object in framing a constitution is orderly government. Knowing that no constitution, however, good it may seem to be when it was framed, would be able to bear the strain of unforeseen developments, the framers wisely provide for the alteration of the Constitution in the interest of orderly change. Between these two co-ordinates, namely, the need for orderly government and the demands for orderly change, both in accordance with the constitution, the makers of the Constitution provide for its amendment to the widest possible limit. If any provision requires amendment by way of addition, alteration or repeal, the change would be entirely permissible. If one were to ask the makers of the Constitution the theoretical question whether they contemplated the repeal of the Constitution, the answer would be, in all probability, in the negative. They did not toil on the Constitution for years in order that it may be repealed by the agencies to whom the amendment of the Constitution is entrusted. They wished it to be permanent, if not eternal, knowing that as time moved, it may continue in utility incorporating all required changes made in an orderly manner. Declaring their faith in the Constitution they will express their confidence that the Constitution which they had framed with the knowledge of their own people and their history would be able to weather all storms when it is exposed to orderly changes by the process of amendment. To them the whole-sale repeal would be unthinkable; but not necessary changes in response to the demands of time and circumstance which, in the opinion of the then amending authorities, the current constitutional instrument would be able to absorb. This is sufficient for the courts to go on as it was sufficient for the framers of the Constitution Quibbling on the meaning of the word 'amendment' as to whether it also involved repeal of the whole Constitution is an irrelevant and unprofitable exercise. Luckily for us besides the word 'amendment' in Article 368 we have also the uncomplicated word 'change' in that article and thus the intention of the framers of the Constitution is sufficiently known. Then again the expression 'amendment of the Constitution' is not a coinage of the framers of our Constitution. That is an expression well-known in modern Constitutions and it is commonly accepted as standing for the alteration, variation or change in its provisions.

1240. Whichever way one looks at the amending power in a Constitution there can be hardly any doubt that the exercise of that power must correspond with the amplitude of the power unless there are express or necessarily implied limitations on the exercise of that power. We shall deal with the question of express and implied limitations a little later. But having regard to the generality of the principle already discussed the meaning of the word 'amendment of the Constitution' cannot be less than 'amendment by way of addition, variation or repeal of any provision of the Constitution' which is the clarification of that expression accepted by the Constitutional 24th Amendment.

1241. We shall now see if there are express or implied limitations in Article 368 itself. Article 368 is found in Part XX of the Constitution which deals with only one subject, namely, the Amendment of the Constitution. The article provides that when the special procedure directed by it is successfully followed the Constitution stands amended in terms of the proposal for amendment made in the Bill. Whatever provision of the Constitution may be sought to be amended, the amendment is an Amendment of the Constitution. The range is the whole of *this Constitution* which means all the provisions of the Constitution. No part of the Constitution is expressly excepted from amendment. Part XX and Article 368 stand in supreme isolation, after the permanent provisions of the Constitution are exhausted in the previous XIX parts. The power to amend is not made expressly subject to any other provision of the Constitution. There are no governing words like "subject to the Constitution" or this or that part of the Constitution. If the framers of the Constitution had thought it necessary to exclude any part or provision of the Constitution from amendment, they would have done so in this part only as was done in the American Constitution. Article V of that Constitution, which was undoubtedly consulted before drafting Article 368, made two specific exceptions. The language structure of Article V has a close resemblance to the language structure of our Article 368. Therefore, if any part of the Constitution was intended to be excluded from the operation of the power to amend it would have normally found in place in or below Article 368. As a matter of fact, in the draft Constitution below Article 304, which corresponds to the present Article 368, there was Article 305 which excluded certain provisions from amendment, but later on Article 305 itself was deleted. Even Article 368 itself was not safe from amendment because the proviso to Article 368 shows that the provisions of the article could be changed. Then again we find that when the people through the Constituent Assembly granted the power to amend, they made no reservations in favour of the people. The people completely withdrew from the process of amendment. In other words, the grant of power was without reservation. Another thing which is to be noted is that when the Constituent Assembly directed that amendments of the Constitution must be made by a prescribed method, they necessarily excluded every other method of amending the Constitution. As long as the article stood in its present form the Parliament could not possibly introduce its own procedure to amend the Constitution by calling a constituent assembly, a convention or the like. Altogether, it will be seen that the grant of power under Article 368 is plenary, unqualified and without any limitations, except as to the special procedure to be followed.

1242. The character of an amendment which can be made in a constitution does not depend on the flexibility or rigidity of a Constitution. Once the rigidity of the restrictive procedure is overcome, the Constitution can be amended to the same degree as a flexible Constitution. So far as a flexible Constitution like that of Great Britain is concerned, we know there are no limits to what the Parliament can do by way of amendment. It can, as pointed out by Dicey, repeal the Act of Union of Scotland by appropriate provisions even in a Dentist's Act. (*Law of the Constitution,* page 145). We know that by the Statute of Westminster the British Parliament removed most of the Imperial fetters from the self-governing colonies and by the Independence of India Act, 1947 surrendered its Indian Empire. Recently the British Parliament invited inroads on its sovereignty by joining the Common Market. Similarly, as we have seen in *McCawley's case* (supra) referred to earlier, the Legislature of Queensland, whose Constitution was a flexible Constitution, was held competent to amend its constitutional provisions with regard to the tenure of office of the Judges of the Supreme Court by a subsequent Act passed in 1916 on the subject of Industrial Arbitration. To the objection that so important a provision of the Constitution was not permissible to be amended indirectly by a law which dealt with Industrial arbitration, Lord Birkenhead made the reply at page 713: "Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section: "This section is fundamental or organic; it can only be altered in such and such a manner"; and of another: "This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision". Their Lordships therefore fully concur in the reasonableness of the observations made by Isaacs and Rich, JJ., that, in the absence of any indication to the contrary, no such character can be attributed to one section of the Act which is not conceded to all, and that if Sections 15 and 16 (relating to the tenure of office of the judges) are to be construed as the respondents desire, the same character must be conceded to Section 56, which provides that in proceedings for printing any extract from a paper it may be shown that such extract was bona fide made". This only emphasises that all provisions in a Constitution must be conceded the same character and it is not possible to say that one is more important and the other less important. When a legislature has the necessary power to amend, it can amend an important constitutional provision as unceremoniously as it can amend an unimportant provision of the Constitution. Dicey observes in his *Law of the Constitution,* 10th edition, p. 127: "The 'flexibility' of our Constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London".

1243. As already pointed out what distinguishes a rigid Constitution from a 'flexible' Constitution is that it requires a special procedure for its amendment. It cannot be legally changed with the same ease and in the same manner as ordinary laws. But if the rigid procedure is successfully followed, the power to amend operates equally on all provisions of the Constitution without distinction. Indeed, rigid Constitutions may safeguard certain provisions from amendment even by the special procedure. But where no such provision is protected the power of amendment is as wide as that of a Parliament with a flexible Constitution. Rigidity of procedure in the matter of amendment is the only point of primary distinction between a 'rigid' and 'flexible' Constitution and when this rigidity is overcome by following the special procedure, the power of amendment is not inhibited by the fact that a constitutional provision is either important or unimportant. The amending power operates on all provisions as effectively as it does in a flexible Constitution. If the nature of the provision is so important that the

Constitution itself provides against its amendment the amending power will have to respect the provision. But if it is not so protected, every provision, important or otherwise, can be amended by the special procedure provided. In that respect the fact that the Constitution is a 'rigid', Constitution does not place any additional restraint.

1244. We have already referred to the principle underlying the Amending provision in a written Constitution. In some Constitutions the special procedure is very 'rigid' as in the American Constitution. In others, especially in more modern Constitutions, having regard to the disadvantages of providing too rigid and restrictive procedures, amending procedures have been made more and more flexible. Our Constitution which learnt from the experience of other similar Constitutions made the amending procedure as flexible as was reasonably possible. There are several articles in the Constitution which permit the Parliament to make laws which are of a constitutional character. There are some other articles which permit amendments to certain other specified provisions of the Constitution by the ordinary legislative procedure. For the rest there is Article 368 which provides a much more flexible procedure than does the American Constitution. The following passages from the book, *Political Science and Comparative Constitutional Law*, Vol. I, written by the great jurist, Johan W. Burgess will show both the rationale for including an amendment clause in a Constitution and the need of making the amending procedure as rigid as possible. At page 137 he says "A complete Constitution may be said to consist of three fundamental parts. The first is the organisation of the State for the accomplishment of future changes in the Constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a Constitution. Upon its existence and truthfulness, i. e. its correspondence with real and natural conditions, depends the question as to whether the State shall develop with peaceable continuity or shall suffer alternations of stagnation, retrogression and revolution. A Constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organised in the Constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the State". Then at pages 150-151 commenting on the disadvantages of the amending procedure of the American Constitution he remarks "when I reflect that, while our natural conditions and relations have been requiring a gradual strengthening and extension of the powers of the Central Government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of civil war, I am bound to conclude that the organization of the sovereign power within the Constitution has failed to accomplish the purpose for which it was constructed.... But I do say this that when a state must have recourse to war to solve the internal questions of its own politics, this is indisputable evidence that the law of its organization within the Constitution is imperfect; and when a State cannot so modify and amend its Constitution from time to time as to express itself truthfully therein, but must writhe under the bonds of its Constitution until it perishes or breaks them as under, this is again indisputable evidence that the law of its organization within the Constitution is imperfect and false. To my mind the error lies in the artificially excessive majorities required in the production of constitutional changes". These passages express the deep anguish of the jurist and his disappointment with the current process of amendment prescribed in the U. S. Constitution. He gives the amending provision supreme importance in the Constitution and wants it to be very much less rigid than what it is, so that the Constitution can correspond with the truth of contemporary, social and political changes. The whole object of providing for amendment is to make the Constitution as responsive to contemporary conditions as possible because, if it is not, the danger of popular revolt, civil war or even revolution in a rapidly changing world may soon overtake the people. That being the political philosophy behind the amending provision it is obvious that the provision must serve the same purpose as in a Parliamentary democracy with a flexible Constitution. The latter can adjust itself more readily with changing conditions and thus discourage violent revolts. If the object of a Constitution is the same, namely, orderly Government and orderly change in accordance with the law, it must be conceded that all Constitutions whether flexible or rigid must have the power to amend the Constitution to the same degree; and if flexible Constitutions have the power to make necessary changes in their most cherished constitutional principles, this power cannot be denied to a Constitution merely because it is a rigid Constitution. The amending power in such a Constitution may, therefore, reach all provisions whether important or unimportant, essential or unessential.

1245. The above proposition is supported by several decisions of the Supreme Court of America and the Supreme Courts of the American States, the Constitutions of which are all 'rigid'. In *Edwards* v. *Lesueur*,[64] it was held that if a State Constitution provides that its General Assembly may at any time propose such amendments to that instrument as a majority of the members elected to each House deem expedient the substance and extent of amendment are left entirely to the discretion of the General Assembly. In *Livermore* v. *Waite*[65] only one of the judges, Judge Harrison, held the view that the word 'amendment' in the State Constitution implied such an addition or change within the lines of the original instrument as will effect an improvement or better carrying out of the purpose for which it was framed. But that view is not shared by others. In the State Constitution of California the word 'amendment' was used in addition to the word 'revision' and that may have influenced the judge to give the word 'amendment' a special meaning. The actual decision was dissented from in *Edwards* v. *Lesueur* (supra) referred to above, decided about 10 years letter, and the opinion of Judge Harrison with regard to the meaning of the word 'amendment' was dissented from in *Ex-parte Dillon*.[66] This case went to the Supreme Court of America in *Dillon* v. *Gloss*[67] and the decision was affirmed. The challenge was to the Prohibition Amendment (18th) and the court observed at p. 996 "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired (that provision expired in 1808) it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both Houses, and the other excluding any amendment which will deprive any State, without its consent, of its equal suffrage in the Senate. A further mode of proposal—as yet never invoked—is provided, which is, that on application of the two-thirds of the States Congress shall call a convention for the purpose. When proposed in either mode, amendments, to be effective, must be ratified by the Legislatures, or by conventions, in three-fourths of the states, "as the one or the other mode of ratification may be proposed by the Congress". Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in

---

[64] South Western Reporter Vol. 33, 1130.

[65] 102 Cal 118.

[66] 262 Federal Reporter 563 decided in 1920.

[67] 65 Law Ed. 994.

SCC Online

three-fourths of them. The plain meaning of this is: (*a*) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (*b*) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all". The above passage is important from two points of view. One is that Article V subjects the amending power to no restrictions except the two expressly referred to in the article itself, and the second point which is relevant for our purpose is that the people's ratification may be obtained in one of two ways, namely, by the State Legislatures or by State conventions. It was for the Congress to choose between these two ways of ratification. But whichever method was chosen, the ratification, whether by the State Legislatures or by special conventions, was the ratification on behalf of the people because they were representatives assemblies who could give a decisive expression of the people's will. As a matter of fact although several amendments have been made to the Constitution under Article V there has been only one, namely, the 21st Amendment which had been referred to State conventions. All other amendments were proposed by the Congress and ratified by the State Legislatures—the ratification being regarded as by people's representatives who could decisively express the people's will. If the State Legislatures in America which have no responsibility for the executive Government of the State are deemed to reflect the will of the people there is greater reason to hold that our Parliament and State Legislatures are no less representative of the will of the people when they participate in the process of amendment of the Constitution.

1246. But reverting to the consideration of the charactar of "an amendment of the Constitution", we find from decided American cases that there are no limits except those expressly laid down by the Constitution. *In Ex-parte Mrs. D. C. Kerby*,[68] decided by the Oregon Supreme Court in 1922 which concerned an amendment restoring the death penalty which had been abolished by a previous amendment to the Bill of Rights of the State Constitution, the following observations in *State* v. *Cox*,[69] were quoted with approval. "The Constitution, in prescribing the mode of amending that instrument, does not limit the power conferred to any particular portion of it, and except other provisions by declaring them not to be amendable. The general assembly, in amending the Constitution, does not act in the exercise of its ordinary legislative authority of its general power; but it possesses and acts in the character and capacity of a convention, and is, quo ad hoc, a convention expressing the supreme will of the sovereign people and is unlimited in its powers save by the Constitution of the United States. Therefore, every change in the fundamental law, demanded by the public will for the public good, may be made, subject to the limitation above named".

1247. In *Downs* v. *City of Birmingham*[70] the Supreme Court of Alabama held that an amendment to State Constitution may extend to a change in form of the State's Government, which may be in any respect except that the Government must continue to be a republican form of government as required by the U. S. Federal Constitution, which was inviolable, and that rights acquired under the Constitution are subject to Constitutional provisions permitting amendments to the Constitution, and no right can be acquired under the State Constitution which cannot be abridged by an amendment of the Constitution and such a rule extends to contract and property rights.

---

[68] 103 Or 612.

[69] 8 Ark 436.

[70] 198 Southern Reporter 231.

1248. In *Schneiderman* v. *United States of America*,[71] which was a denaturalization case on the ground of non-allegiance to the "priniciples" of the American Constitution, Murphy, J., delivering the opinion of the court said, pp. 1808-1809: "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed. Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. *Cf. National Prohibition Cases* (*Rhode Island* v. *Palmer*).[72] This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution".

1249. In *Ullmann* v. *United States*[73], Frankfurter, J., delivering the opinion of the Supreme Court on the privilege against self-incrimination (Fifth Amendment) which, by the way, is recognised by our Constitution as a fundamental right, quoted with approval Chief Judge Macgruder who said "if it be thought that the privilege is out-moded in the conditions of this modern age then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion".

1250. Recently in *Whitehill* v. *Elkins*[74], Douglas, J., delivering the opinion of the court, observed at p. 231 "If the Federal Constitution is our guide, a person who might wish to 'alter' our form of government may not be cast into the outer darkness. For the Constitution prescribes the method of 'alteration' by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered."

1251. It is unnecessary to multiply cases to appreciate the width of the amending power in a 'rigid' Constitution. Even the dictionaries bring out the same sense. The word 'amend' may have different nuances of meaning in different contexts, like "amend once conduct", "amend a letter or a document", "amend a pleading", "amend a law" or "amend a Constitution". We are concerned with the last one, namely, what an amendment means in the context of a Constitution which contains an amending clause. In the *Oxford English Dictionary*, Vol. I the word 'amend' is stated to mean "To make professed improvements in (a measure before Parliament); formally, to alter in detail, though practically it may be to alter its principle so as to thwart it".

1252. Sutherland in his *Statutes and Statutory Construction*, third edition, Vol. I, p. 325 has explained an "amendatory act", as any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form.

1253. In *Words and Phrases*, *Permanent Edition*, Vol. 3, p. 447 it is generally stated that the word 'amendment' involves an alteration or change, as by addition, taking away or modification. It is further explained that the words 'amend', 'alter', and 'modify' are in general use and their meaning is not uncertain. Each means to change. A broad definition of the word 'amendment' would include any alteration or change. Further on (458) it is explained in the context of a Constitution that an 'amendment' of a Constitution, repeals or changes some provision in, or adds something to, the instrument amended. Then citing *Downs* v. *City of Birmingham*, (supra) already referred to, it is stated that every proposal which effects a change in a Constitution or adds to or takes away from it is an 'amendment', and the proposal need not be germane to any other feature of the Constitution, nor to the feature which is amended.

---

[71] 87 Law Ed 1796.

[72] 64 Law Ed 946.

[73] 100 Law Ed 511.

[74] 19 Law Ed 2d 228.

1254. Similarly citing *State* v. *Fulton*[75], it is explained that the word 'amendment', when used in connection with the Constitution, may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article, or section, and is then used to indicate an addition to, the striking out, or some change in that particular section.

1255. In *Standard Dictionary of Funk and Wagnalls* 'amendment' is defined as an act of changing a fundamental law as of a political Constitution or any change made in it according to a prescribed mode of procedure; as to alter the law by amendment, an amendment of the Constitution.

1256. In a *Dictionary of the Social Sciences* edited by Julius Gould and William L. Kolb compiled under the auspices of the UNESCO p. 23, the word 'amendment' has been explained. "The term 'amendment', whenever used, has the core denotation of alteration or change. Historically the change or alteration denoted was for the sake of correction or improvement. In the realities and controversies of politics, however, the nature of correction or improvement becomes uncertain, so that alternation or change remains the only indisputable meaning as the term is applied. Probably the most fundamental type of formal amendment is that which is constituted by the alteration of the formal language of written Constitutions. The importance of the amending procedure in a time of serious social change has been stated by C. J., Friedrich. A well drawn Constitution will provide for its own amendment in such a way as to forestall as far as is humanly possible revolutionary upheavals. that being the case the provisions for amendment form a vital part of most modern Constitutions. (*Constitutional Government and Democracy* — Boston 1941 p. 135). It will be thus seen that having regard to the object of providing an amendment clause in a modern Constitution, amendment must stand for alteration and change in its provisions.

1257. That this was intended is clear from the wording of Article 368. The main part of the Article speaks only of "an amendment of this Constitution". It shows how a proposal for amendment becomes part of the Constitution. The language structure of Article 368 recalls the language structure of Article V of the American Constitution. There also the words used are "amendment to this Constitution", and nothing more. No such supplementary words like "by addition, alteration or repeal" are used. Yet we have seen that so far as Article V is concerned an amendment under Article V involves alteration and change in the Constitution. Article 368 has a proviso which begins with these words "provided that if such amendment seeks to make any *change* in : (*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or (*b*) Chapter IV of Part V Chapter V of the Part VI, or Chapter I of Part XI, or (*c*) any of the Lists in the Seventh Schedule or (*d*) the representation of States in Parliament, or (*e*) the provisions of this article, the amendment shall also require to be ratified by the legislatures etc. etc". The proviso, therefore, clearly implies that an amendment under Article 368 *seeks to make a change* in the provisions of the constitution. If the amendment seeks to make a change in the provisions referred to in sub-clauses (*a*) to

---

[75] 124 NE 172.

(*e*) then only the amendment which makes such a change in these provisions requires ratification by the State legislatures. Otherwise, the amendment making a change in other provisons does not require ratification. We have already observed that the meaning of the word 'change' is uncomplicated and can be easily felt and understood. The noun 'change' according to the *Shorter Oxford English Dictionary* means "substitution or succession of one thing in place of another; substitution of other conditions; variety". It also means alteration in the state or quality of anything; variation, mutation. There can be no doubt, therefore, that, having regard to the importance of the amending clause in our Constitution, an amendment contemplates changes in the provisions of the Constitution which are capable of being effected by adding, altering or repealing them, as found necessary, from time to time. As a matter of fact it is impossible to conceive of even the simplest form of amendment without adding, altering or repealing. If you add some words to a provision of the Constitution you thereby alter the provision. If you substitute a few words, you alter and repeal. Mr. Palkhivala admitted that he had no objection whatsoever to an amendment improving the Constitution so that it can serve the people better. He said that it was open to the Parliament to improve the content of the Constitution by making necessary changes. All that would necessarily imply amendment by way of addition, variation or repeal of a provision of the Constitution which is just what the 24th Amendment seeks to do. As a matter of fact any amendment to the Constitution which the representatives of the people want to make is professedly an improvement. No proposer of an amendment of a Constitution, whatever his opponents may say to the contrary, will ever agree that his proposal is retrogressive. Therefore, improvement or non-improvement cannot be the true test of an amendment. Alteration and change in the provisions is the only simple meaning, which the people for whom the Constitution is made, will understand.

1258. Having seen the importance of the amending clause in a Constitution, the philosophy underlying it and the amplitude of its power, it will be improper to try to cut down the meaning of the word 'amendment' in the expression 'amendment of the Constitution' by comparing it with the same word used in other provisions of the Constitution or other statutes in a different context. Not that such a comparison will in any way serve the object with which it is made, but it will amount to comparing, in effect, two words-one operating on a higher plane and the other on a lower. The word amendment in the expression "amendment of the Constitution" operates on a higher plane and is substantialy different in connotation from the same word used on a lower plane in some other provision of the Constitution or any other statute in an entirely different context. To say that the word 'amendment' in 'amendment of the Constitution' is used in a low key because padding words like amendment "by way of addition, variation or repeal" are used elsewhere in the Constitution would be to ignore the status of the word 'amendment' when used in the context of amending the Constitution. Indeed the expression "amendment by way of addition, variation or repeal" would also amount to 'amendment'. But it is more appropriately used when some distinct provisions of a statute are under consideration and even the extreme limit of a repeal of such provisions is contemplated. In the case of an amendment of the Constitution this extreme limit of the repeal of the constitution is not, as already pointed out, ordinarily contemplated. In the present case the comparison was principally made with "amend by way of addition, variation or repeal" in sub-paragraphs 1 of para 7 and 21 in the Fifth and Sixth Schedules respectively. In both these cases, Parliament is authorized from time to time, by law, to make the amendment in any of the provisions of the two schedules. The authority is not only to add to the provision or vary the provision but even repeal the provision. Having provided that way in sub-paragraph (1) the framers of the Constitution added sub-para (2) in each case, but for which, what was done in accordance with sub-para (1) was likely to be misunderstood as an amendment of the Constitution as discribed in Article 368. Textually the provisions in the Schedules would stand amended. But this amendment is carried out 'by law'. On the other hand, if even a word in any provision of the Constitution is changed in accordance with Article 368, it is not described as an amendment of the provision but an amendment of the Constitution with all its wide connotations.

1259. In Articles 4 and 169(2) we have just the word 'amendment' for amending certain provisions of the Constitution by law, and both of them show in their context, without even the use of the padding words, that such an amendment would be really by way of addition, alteration and repeal. Then again such amendments are expressly taken out of the class of "amendment of the Constitution for the purposes of Article 368" but for which they would have amounted textually to an amendment.

1260. Reference was also made to the amendment made by the constituent assembly in Section 291 of the Government of India Act, 1935 where similar padding words were used along with the word 'amend'. Here again it will be seen that the amendment was not an amendment of the Constitution but an authorization of the Governer-General to amend, by Order, certain provisions relating to the provincial Legislatures which were liable even to be repealed. No implications can be drawn with regard to the power under Article 368 by a reference to another statute where a particular phraseology is adopted in its own context. On the other hand this may be contrasted with the wording of Section 308 (later repealed) which provided for 'the amendment of the Act and the Orders in council' on the proposals made by the Federal and State legislatures. The Act referred to is the Government of India Act, 1935. No padding words are used in the section although the context shows that amendment would inevitably involve, adding, altering or repealing certain provisions of the Government of India Act or Orders in-Council.

1261. The structure of Article 368 is now changed by the 24th Amendment and the expanded expression "amendment by way of addition, variation or repeal, any provision of this Constitution" is adopted. The language structure of the original Article 368 was, however, different and there was no reference to "the provisions" of the Constitution therein. The article commenced with the words "An amendment of this Constitution" without reference to any provisions. Reference to "provisions of the Constitution" having been eschewed, to pad the expression "amendment of the constitution" by the words "by way of addition, variation or repeal" would have been inappropriate; because such padding was likely to give the impression that the intention was to amend by addition to and, alteration and repeal of, the Constitution, considered as a whole. Neither the alteration nor the repeal of the Constitution, as as a whole, could have been intended and hence the padding words would not have commended' themselves to the Draftsmen. And because that was not the intention, we have to take the first step of legally construing "this Constitution" as "every provision of the Constitution" and then import the padding words with reference to the provision. Such a construction is perfectly permissible having regard to the general meaning of the word "amendment". Since doubts were expressed in the leading majority judgement of five judges in opposition to the view of the other six judges, who agreed that the word 'amendment' was wide in its application, the 24th Amendment had to clarify the position.

1262. Article V of the American Constitution used only the words 'amendment to the Constitution' without any padding like "by way of addition, variation or repeal" and yet no body questions the fact that after 1789, when the Constitution was framed, there have been several additions, alterations and repeals. Actually the 18th Amendment was repealed by the 21st.

1263. We thus come to the conclusion that so far as the wording of Article 368 itself is concerned, there is nothing in it which limits the power of amendment expressly or by necessary implication. Admittedly it is a large power, whether one likes it or not, it is not the function of the Court to invent limitations where there are none. Consequences of wreckless use of the power are political in character with which we are not concerned. Consequences may well be considered in fixing the scope and ambit of a power, where the text of the statute creating the power is unclear or ambiguous. Where it is clear and unambiguous, courts have to implement the same without regard to consequences good or bad, just or unjust. In *Vacher's case*[76] Lord Shaw observed at page 126 "Were they (words) ambiguous, other sections or sub-sections might have to be invoked to clear up their meaning; but being unambiguous, such a reference might distort that meaning and so produce error. And of course this is a fortiori the case, if a reference is suggested, not to something within, but to considerations extraneous to, the Act itself. If, for instance, it be argued that the mind of Parliament "looking before and after," having in view the past history of a question and the future consequences of its language, must have meant something different from what is said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down or even to vaporize it, but is a most dangerous exercise for any interpreter like a Court of law, whose duty is loyally to accept and plainly to expound the simple words employed".

1264. We have to see next whether there are express limitations on the amending power elsewere in the Constitution. The only provision to which our attention is drawn in Article 13(2). The article, before its amendment by the 24th Amendment, was as follows:

> 13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be void.
>
> (3) In this article, under the context otherwise requires,—
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

---

[76] 1913 AC 107.

(*b*) "laws in force" includes laws passed or made by a Legislature or otherwise competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

It is obvious from Article 13(1) and (2) that the intention was to make the fundamental rights paramount and invalidate all laws which were inconsistent with the fundamental rights. On the commencement of the Constitution of India there could not possibly be a vacuum with regard to laws and, therefore, by Article 372(1) all the laws in force in the territory of India immediately before the commencement of the Constitution were continued in force until altered or repealed or amended by a competent legislature or other competent authority. Such laws which were in force before the commencement of the Constitution and were continued under Article 372(1) were, in the first instance, declared void to the extent of their inconsistency with the provisions of Part III containing the fundamental rights. As to future laws provision was made under clause (2) which commanded that the State shall not make a law which takes away or abridges the rights conferred by Part III and further added that any law made in contravention of the clause would be void to the extent of the contravention.

1265. It was contended before us that an amendment of the Constitution under Article 368 was a law made by the State and, therefore, to the extent that it contravened clause (2) it would be void. The submission was similar to the one made in *Golak Nath's case* (supra) which was upheld by the majority of six judges. In the leading majority judgment it was held that it was a law which was made under Article 248 read with the residuary Entry 97 of List I of the Seventh Schedule and, therefore, would be void if it took away or abrided any of the fundamental rights. Hidayatullah, J., who agreed with the conclusion did not agree that the power to amend was traceable to the residuary article referred to above. Nevertheless he held "it was indistinguishable from the other laws of the land for the purpose of Article 13(2)". The other five judges who were in the minority agreed substantially with the view taken in *Sankari Prasad's case* (supra) and by the majority in *Sajjan Singh's case* (supra) that this was not a law within the meaning of Article 13(2) because, in their opinion, an amendment of the constitution under Article 368 was an act in exercise of the constituent power and, was, therefore, outside the control of Article 13(2).

1266. Mr. Palkhivala submitted that he was not interested in disputing where the power to amend actually lay. Even assuming, he contended, the power to amend was to be found in Article 368, the worst that could be said against him was that the amendment was a constitutional law and in his submission even such a law would be taken in by Article 13(2). In this connection he argued that there were certain laws made in the Indian States or even other laws which could be properly described as constitutional laws which continued in force after the commencement of the Constitution and came within the category described in Article 13(1) and, therfore, there was no reason why an amendment of the constitution which was also a constitutional law should not come within the prohibition of Article 13(2). The Indian Independence Act, 1947 and the Goverment of India Act, 1935 which were the two main constitutional statutes in accordance with which the country had been governed had been specifically repealed by

Article 395. No other statute of similar competence and quality survived our Constitution. It may be that certain statutes of the States and other constitutional documents may have continued in force as laws under Article 13(1) but it would be wrong to conclude therefrom that an amendment of the Constitution, also being a constitutional law, would be deemed to have been included in the word 'law' in Article 13(2). We must be clear as to what 'constitutional law' means in a written constitution. Jennings in his *The Law and the Constitution* (fifth edition), pp. 62-65 points out that there is a fundemental distinction between constitutional law and the rest of the law and that the term 'constitutional law' is never used in the sense of including the law of the constitution and the law made under it. In the context of the question in issue, we are concerned with our Constitution which is the supreme fundemental law, on the touchstone of which the validity of all other laws—those in force or to be made by the State—is to be decided and since an amendment of the supreme law takes an equal place, as already pointed out, with the rest of the provisions of the constitution we have to see whether an amendment of such quality and superiority is sought to be invalidated by Article 13(2). Other laws in force at the time of the commencement of the Constitution consisting of State treaties or State statutes were not laws of this superior category. In fact Article 372(1) itself shows that if they were to continue in force they were to do so subject to the other provisions of this constitution and were liable to be altered or repealed or amended by a compenent legislature or other competent authority. All such laws though vaguely described as constitutional were made absolutely subordinate to the Constitution. In that respect they were no better than any other laws which were continued in force after the commencement of the Constitution and to the extent that they were inconsistent with the fundamental rights, they stood on the same footing as any other laws which continue in force after the commencement of the Constitution. Their status was entirely subordinate to the Constitution. On the other hand, the stature of a constitutional amendment, as already seen, is the stature of the Constitution itself and, therefore, it would be wrong to equate the amendment of the Constitution with a so-called constitutional law or document which survived after the commencement of the Constitution under Article 372(1).

1267. An amendment of the Constitution cannot be regarded as a law as understood in the Constitution. The expressions 'law', 'by law', 'make a law', are found scattered throughout the Constitution. Some Articles, as shown by Bachawat, J., in *Golak Nath's case* (supra) at pp. 904, 905 are exprsessly continued until provision is made by law. Some articles of the Constitution continue unless provision is made otherwise by law; some continue save as otherwise provided by law. Some Articles are subject to the provisions of any law to be made and some are expressed not to derogate from the power of making laws. Articles 4, 169, Para 7 of the Fifth Schedule and Para 21 of the Sixth Schedule empower the Parliament to amend the provisions of the First, Fourth, Fifth and Sixth Schedules by law. A reference to all these articles will show that in all these articles the expression 'law' means a law made by the Parliament in accordance with its ordinary legislative procedure. On the other hand, it is a point worthy of note that Article 368 scrupulously avoids the use of the word 'law'. After the proposal for amendment, introduced in Parliament in the form of a bill, is passed by the two Houses separately with the requisite majority and is assented to by the President with prior ratification by the requisite number of States in certain cases mentioned in the proviso, the proposed amendment writes itself into the Constitution as a part of it. It is not passed, as already pointed out, as any other law is passed by the ordinary procedure by competent legislatures. The ratification by the State Legislatures by a resolution is not a legislative act. The whole procedure shows that the amendment is made by a process different from the one which is compulsory for any other laws made by the Parliament or the State Legislatures, and hence advisedly the term 'law' seems to have been avoided. In doing this the framers of the Constitution might have been influenced by the view held by many jurists in America that Article V of the American Constitution to which Article 368 conforms to some extent in its language structure don't regard an amendment of the constitution as a legislative act. Finer called it, as we have already seen the Constitution itself. "In proposing a constitutional amendment, the legislature is not exercising its ordinary legislative function". *Corpus Juris Secundum*, Vol. 16, pp. 48-49. "Under Article V of the American Constitution the proposal by the congress for amendment and the ratification by the States are not acts of legislation". Burdick—*The Law of the American Constitution* pp. 40-42. "Ratification by the States is not a legislative act"—*Weaver*: *Constitutional Law and its Administation*, p. 50.

1268. Secondly, we find in several places in our Constitution the two words 'Constitution' and the 'law' juxtaposed which would have been unnecessary if the word 'law' included the Constitution also. For example, in the oath of the President mentioned in Article 60 and of the Governor of a State in Article 159 it would have been sufficient for him to swear that he would "preserve, protect and defend the law" instead of swearing that he would "preserve, protect and defend the Constitution and the law". Similarly the Attorney-General under Article 76 and the Advocates-General of the States under Article 165 need have merely sworn that he would "discharge the functions conferred on him by law" instead of that "he would discharge the functions conferred by and under this Constitution or any other law for the time being in force". Similar is the case with the oaths prescribed in the Third Schedule for the judges of the Supreme Court and the High Courts and the Comptroller and Auditor-General. Indeed it is quite possible to urge that the Constitution has been specially mentioned in order to emphasize its importance. But that is the very point. Its importance lies in its supremacy over all kinds of other laws—a special position which the framers of the Constitution, thoroughly acquainted with federal and quasi-federal constitutions of the more important countries in the world, must have always known. In any case they knew that the Constitution was distinct from other laws. On that footing it would be only reasonably expected that if an amendment, not being of the nature of an ordinary law, was intended to be included in the word 'law' in Article 13(2), it would have been specifically mentioned in the definition of the word 'law' given in clause 3(1) of Article 13. The definition is an inclusive definition. It does not mention enacted law or statute law in the definition, apparently because no-body needs to be told that an act of a legislature is law. But it includes such things like an ordinance, order, bye-law, rules regulation, notification, custom or usage in order to clarify that although, the aforesaid are not enactments of a legislature, they were still 'law' falling within the definition. An objection seems to have been anticipated that ordinances, orders, bye-laws etc., not being the acts of a legislature, are not laws. That apparently was the reason for their specific inclusion. If, therefore, an amendment of the Constitution was intended to be regarded as 'law', not being an ordinary statute of the legislature, it had the greatest claim to be included specifically in the definition. Its omission is, therefore, very significant.

1269. The significance lies in the fact that the Constitution or its amendment is neither a law in force within the meaning of Article 13(1) continued under Article 372(1); nor can it be regarded as a law made by the State within the meaning of Article 13(2). The bar under Article 13(2) is not merely against law but a law made by the State. A fundemental right conferred by Part III could not be taken away or abridged by law made by the "State". To leave no doubt as to what the 'State' means, Part III, containing the fundamental rights, opens with the definition of the word 'State' in Article 12. According to that definition the State includes the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The definition thus includes all governmental organs within the territories of India and these governmental organs are either created under the Constitution or under the laws adopted by the Constitution under Article 372. In other words, they are all organs or agencies operating under the Constitution owing superior obligation to the Constitution. It would be, therefore, wrong to identify 'state' in Article 13(2) with anything more than the instruments created or adopted by the Constitution and which are required to work in conformity with the Constitution. Nor can the word 'State' be regarded as standing for a Nation or a conglomeration of all the governmental agencies. The nation is an amorphous conception. The bar under Article 13(2) is against concrete instrumentalities of the State, instrumentalities which are capable of making a law in accordance with the Constitution.

1270. By its very definition as discussed earlier, a body or set of bodies exercising, as indicated in the Constitution, sovereign constituent power whether in a 'flexible' or a 'rigid' Constitution is not a governmental organ owing supreme obligation to the Constitution. The body or bodies operate not under the Constitution but over the Constitution. They do not, therefore, while amending the Constitution, function as governmental organs and, therefore, cannot be regarded as the State for the purposes of Part III of the Constitution.

1271. We thus reach the conclusion that an amendment of the Constitution is not a law made by the State and hence Article 13(2) would not control an amendment of the Constitution.

1272. The same conclusion is arrived at by a slightly different approach. Article 13(2) speaks of a law which becomes void to the extent it takes away or abridges a fundamental right as conferred by certain articles or provisions in Part III of the Constitution. Thus it embodies the doctrine of ultra vires well-known in English law. In other words, it is a law about which one can predicate voidability with reference to the provisions of the Constitution. This is possible only when it is a law made by the organs of the State. When an amendment is made, we have already shown, it becomes part of the Constitution, taking an equal status with the rest of the provisions of the Constitution. Voidability is predicated only with reference to a superior law and not an equal law. There is no superior law with reference to which its voidability can be determined. Indeed, if the amendment cannot entirely fit in with some other provisions of the Constitution the courts might have to reconcile the provisions, as was done in *Sri Venkataramana* v. *The State of Mysore*,[77] in which the fundamental right under Article 26(*b*) was read subject to Article 25(2)(*b*) of the Constitution. The point, however, is that courts have no jurisdiction to avoid one provision of the law with reference to another provision of the same law. It becomes merely a matter of construction. It follows, therefore, that an amendment of the Constitution not being liable to be avoided with reference to a superior law is not a law about which you can predicate avoidability and, hence, stands outside the operation of Article 13(2).

---

[77] 1958 SCR 895: AIR 1958 SC 255: 1958 SCJ 382.

1273. If the fundamental rights in Part III were unamendable, nothing would have been easier than to make a specific provision about it in Part XX which dealt specifically with the subject of the amendment of the Constitution. That was the proper place. Article V of the American Constitution clearly indicated the two subjects which were unamendable. The Draft Constitution shows that, as a matter of fact, there was Article 305 under the subject "amendment of the Constitution" and that Article had specifically made some parts of the Constitution unamendable. Later, Article 305 was deleted and the main amending article in the Draft Constitution, namely, Article 304 appeared in the garb of Article 368 of the Constitution with some additional subjects in the proviso.

1274. In adopting the distinction between the 'Constitution' and 'the law' the framers of the Constitution did not create any new concept of the law being subordinate to the Constitution. That was a concept which was well-recognized in Federal Constitutions specially providing for the amendment of the Constitution by a special procedure.

1275. No body disputes that law in its widest sense includes constitutional law as it does natural law, customary law or ecclesiastical law. The point is whether in our Constitution 'law' includes an "amendment of the Constitution". As already shown our Constitution has maintained a meticulus distinction between ordinary law made by the legislature by ordinary legislative procedure and an amendment of the Constitution under Article 368. This is highlighted even when certain provisions of the Constitution are amended by ordinary law. As already shown Articles 4, 169 and Paras 7 and 21 of the Fifth and Sixth Schedules respectively permit the Parliament to make 'by law' certain amendments in the constitution, but in every case it is further provided that such an amendment made 'by law' shall not be deemed to be an amendment of the Constitution for the purposes of Article 368. When such a distinction is maintained between 'law' and 'an amendment of the Constitution' the same cannot be impaired by reference to the word 'law' used by the Privy Council in a more comprehensive sense in *McCawley's case* (supra) and *Rana Singhe's case*,[78] in the former the Constitution was a flexible constitution. In the latter, though it was a controlled constitution the provision with regard to the amendment of the Constitution namely Section 29(4) of the Ceylon (Constitution) order in Council was part of Section 29 which specifically dealt with the making of laws and came under the subject heading of Legislative power and procedure. In both cases the Legislature was sovereign and as often happens in legislatures, principally modelled after the British Parliament, the distinction between constitutional law and ordinary law becomes blurred and the use of the word 'law' to describe a constitutional law is indeterminate. We are, however, concerned with our Constitution and cannot ignore the distinction maintained by it in treating ordinary laws as different from the amendment of the Constitution under Article 368. The forms of oath in the Third Schedule referring to "Constitution as by law established" prove nothing to the contrary because as "by law established" merely means Constitution "as legally established". There is no indication therein of any intended dichotomy between "law" and "the Constitution".

---

[78] (1965) AC 172.

1276. Reference was made to the constituent assembly debates and to the several drafts of the Constitution to show how the original provision which culminated in Article 13 underwent changes from time to time. They hardly prove anything. The fact that initially Article 13 was so worded as not to override the amendment of the fundamental rights, but later the Drafting Committee dropped that provision does not prove that the framers of the Constitution were of the view that Article 13(2) should reach an amendment of the Constitution if it abridged fundamental rights. It had been specifically noted in one of the notes accompanying the first draft that Article 13(2) would not control an amendment of the Constitution and, therefore, any clarification by a special provision to the effect that fundamental rights are amendable was not necessary except by way of abundant caution. (See: Shiva Rao "*The Framing of India's Constitution*, Vol. IV, page 26). That was apparently the reason for deleting that part of Article 13 which said that Article 13 should not come in the way of an amendment to the Constitution by which fundamental rights were abridged or taken away. Neither the speeches made by the leaders connected with the drafting of the Constitution nor their speeches (the same constituent assembly had continued as the provisional Parliament) when the first amendment was passed incorporating serious inroads into the fundamental rights conferred by Articles 15, 19 and 31 show that the fundamental rights were intended or understood to be unamendable—rather the contrary.

1277. The further argument that fundamental rights are inalienable natural rights and, therefore, unamendable so as to abridge or take them away does not stand close scrutiny. Articles 13 and 32 show that they are rights which the people have "conferred" upon themselves. A good many of them are not natural rights at all. Abolition of untouchability (Article 17); abolition of titles (Article 18); protection against double jeopardy [Article 20(2)]; protection of children against employment in factories (Article 24); freedom as to attendance at religious instruction or religious worship in certain educational institutions (Article 28) are not natural rights. Nor are all the fundamental rights conceded to all as human beings. The several freedoms in Article 19 are conferred only on citizens and not non-citizens. Even the rights conferred are not in absolute terms. They are hedged in and restricted in the interest of the general public, public order, public morality, security of the State and the like which shows that social and political considerations are more important in our organized society. Personal liberty is cut down by provision for preventive detention which, having regard to the conditions prevailing even in peace time, is permitted. Not a few members of the constituent assembly resented the limitations on freedoms on the ground that what was conferred was merely a husk. Prior to the Constitution no such inherent inalienability was ascribed by law to these rights, because they could be taken away by law.

1278. The so-called natural rights which were discovered by philosophers centuries ago as safeguards against contemporary political and social oppression have in course of time, like the principle of *laissez faire* in the economic sphere, lost their utility as such in the fast changing world and are recognized in modern political constitutions only to the extent that organized society is able to respect them. That is why the Constitution has specifically said that the rights are conferred by the people on themselves and are thus, a gift of the Constitution. Even in the most advanced and orderly democratic societies in the world in which political equality is to a large extent achieved, the content of liberty is more and more recognized to be the product of social and economic justice without which all freedoms become meaningless. To claim that there is equal opportunity in a society which encourages or permits great disparties in wealth and other means of social and political advancement is to run in the face of facts of life. Freedoms are not intended only for the fortunate few. They should become a reality for those whose entire time is now consumed in finding means to keep alive. The core philosophy of the Constitution lies in social, economic and political justice—one of the principal objectives of our Constitution as stated in the Preamble and Article 38, and any move on the part of the society or its government made in the direction of such justice would inevitably impinge upon the "sanctity" attached to private property and the fundamental right to hold it. The Directive Principles of State Policy, which our Constitution commands should be fundamental in the governance of the country, require the state to direct its policy towards securing to the citizens adequate means of livelihood. To that and the ownership and control of the material resources of the community may be distributed to serve the common good, and care has to be taken that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. See: Articles 37 to 39. This mandate is as important for the State as to maintain individual freedoms and, therefore, in the final analysis it is always a continuous endeavour of a State, having the common good of the people at heart, so to harmonize the Directive Principles and the fundamental rights that, so far as property rights are concerned, the unlimited freedom to hold it would have to undergo an adjustment to the demands of the State policy dictated by the Diretive Principles. Deprivation of property in one form or other and even expropriation would, in the eyes of many, stand justified in a democratic organization as long as those who are deprived do not earn it by their own effort or otherwise fail to make adequate return to the society in which they live. The attribute of 'sacredness' of property vanishes in an egalitarian society. And once this is accepted and deprivation and expropriation are recognized as inevitable in the interest of a better social organization in which the reality of liberty and freedom can be more widely achieved, the claim made on behalf of property that it is an immutable and inalienable natural right loses its force. One cannot lift parts of the Constitution above it by ascribing ultra-constitutional virtues to them. The Constitution is a legal document and if it says that the whole of it is amendable, we cannot place the fundamental rights out of bounds of the amending power. It is essential to note in the present case that though the plea was generally made on behalf of all fundamental rights, the fundamental right with which we are concerned, principally, is the right to property. It will be sufficient to note here that in modern democracies the tendency is not to recognize right to property as an inalienable natural right. We can do no better than quote here a few passages from W. Friedmann's *Legal Theory*, fifth edition, 1967:

> "The official doctrine of the modern Roman Catholic Church, from Rerum Novarum (1891) onwards, and of most neo-scholastic philosophers, is that the right of private property is a dictate of natural law. But St. Thomas Aquinas and Suarez strongly deny the natural law character of the right of private property and regard it (rightly as I believe) merely as a matter of social utility." p. 357.
>
> "When faced with the solution of concrete legal problems, we find time and again that natural law formulae may disguise but not solve

the conflict between values, which is a problem of constant and painful adjustment between competing interest, purposes and policies. How to resolve this conflict is a matter of ethical or political evaluation which finds expression in current legislative policies and to some extent in the impact of changing ideas on judicial interpretations. And, of course, we all have to make up our minds as responsible human beings and citizens what stand we will take, for example in the tension between state security and individual freedom. The danger is that by giving our faith the halo of natural law we may claim for it an absolute character from which it is only too easy to step to the condemnation or suppression of any different faith". (pp. 357-358).

"The time is past when Western beliefs can be regarded as a measure of all things. Nor will the natural law hypothesis aid much in the solution of the agonising problem of the limits of obedience to positive law." (p. 359).

"The main forces in the development of modern democratic thought have been the liberal idea of individual rights protecting the individual, and the democratic idea proper, proclaiming equality of rights and popular sovereignty. The gradual extension of the idea of equality from the political to the social and economic field has added the problems of social security and economic planning. The implementation and harmonisation of these principles has been and continues to be the main problem of democracy." (p. 398).

"But democratic communities have universally, though with varying speed and intensity, accepted the principle of social obligation as limiting individual right." (p. 399).

"But modern democracy, by the same process which has led to the increasing modification of individual rights by social duties towards neighbours and community, has every-where had to temper freedom of property with social responsibilities attached to property. The limitations on property are of many different kinds. The State's right of taxation, its police power and the power of expropriation—subject to fair compensation—are examples of public restrictions on freedom of property which are now universally recognized and used. Another kind of interference touches the freedom of use of property, through the growing number of social obligations attached by law to the use of industrial property, or contracts of employment." (p. 405).

"The degree of public control over private property depends largely on the stringency of economic conditions. Increasing prosperity and availability of consumer goods has led to a drastic reduction of economic controls, and a trend away from socialisation in Europe. But in the struggling new democracies such as India, poor in capital and developed-resources, and jealous of their newly-won sovereignty, public planning and control over vital resources are regarded as essential. The Constitution of the West German Republic of 1949, which reflects a blend of American, British and post-war German ideas on the economic aspects of democracy, lays down that land, minerals and means of production may be socialised or be subjected to other forms of public control by a statute which also regulates compensation. Such compensation must balance the interests of the community and those of the individual and leave recourse to law open to the person affected. This still permits wide divergencies of political and economic philosophy, but

> in the recognition of social control over property, including socialisation as a legitimate though not a necessary measure, it reflects the modern evolution of democratic ideas. Between the capitalistic democracy of the United States and social democracy of India there are many shades and variations. But modern democracy looks upon the right of property as one conditioned by social responsibility by the needs of society, by the "balancing of interests" which looms so large in modern jurisprudence, and not as preordained and untouchable private right." (p. 406).

1279. Nor is it correct to describe the fundamental rights, including the right to property, as rights "reserved" by the people to themselves. The Constitution does not use the word "reserved". It says that the rights are "conferred" by the people upon themselves, suggesting thereby they were a gift of the Constitution. The Constitution had, therefore, a right to take them away. This is indirectly recognised in *Golak Nath's case* (supra) where the majority has conceded that all the fundamental rights could be taken away by a specially convened constituent assembly. When rights are reserved by the people, the normal mode, as in the several states of America, is a referendum, the underlying principle being that ultimately it is the people, who had given the Constitution and the rights therein, that could decide to take them away. In our Constitution the people having entrusted the power to the Parliament to amend the whole of the Constitution have withdrawn themselves from the process of amendment and hence clearly indicated that there was no reservation. What the Constitution conferred was made revocable, if necessary, by the amendatory process. In my view, therefore, Article 13(2) does not control the amendment of the Constitution. On that conclusion, it must follow that the majority decision in *Golak Nath's case* (supra) is not correct.

1280. No reference was made to any other provision in the Constitution as expressly imposing a limitation on the Amending power.

1281. It was next contended that there are implied or inherent limitations on the amendatory power in the very structure of the Constitution, the principles it embodies, and in its essential elements and features (described briefly as essential features). They are alleged to be so good and desirable that it could not have been intended that they were liable to be adversely affected by amendment. Some of the essential features of the Constitution were catalogued as follows:

(1) The supremacy of the Constitution;
(2) The sovereignty of India;
(3) The integrity of the country;
(4) The democratic way of life;
(5) The Republican form of Government;
(6) The guarantee of basic human rights referred to in the Preamble and elaborated as fundamental rights in Part III of the Constitution;
(7) A secular State;
(8) A free and independent judiciary;
(9) The dual structure of the Union and the States;
(10) The balance between the legislature, the executive and the judiciary;

(11) A Parliamentary form of Government as distinct from Presidential form of Government;

(12) The amendability of the Constitution as per the basic scheme of Article 368.

1282. These, according to Mr. Palkhivala, are some of the essential features of the Constitution and they cannot be substantially altered by the amendatory process.

1283. A question of very wide import is raised by the submission. So far as the present case is concerned, the 24th Amendment does no more than give effect to Parliament's acceptance of the view taken in *Sankari Prasad's case* (supra), the majority in *Sajjan Singh's case* (supra) and the minority in the *Golak Nath's case* (supra) with regard to the nature of the amending power in relation to fundamental rights. It is clarificatory of the original Article 368. What was implicit in Article 368 is now made explicit and the essence of Article 368 is retained. Therefore, there can be no objection to the 24th Amendment on the ground that any essential feature of the Constitution is affected.

he

1284. The 25th Amendment introduces some abridgement of the fundamental right to property. Right to property has been subject to abridgement right from the Constitution itself [See Article 31(4) and (6)] and the 25th Amendment is a further inroad on the right to property. In *Golak Nath's case* (supra), the first, fourth and the seventeenth amendments were held by the majority as having contravened Article 13(2). Nevertheless the amendments were not struck down but permitted to continue as if they were valid. Since I have come to the conclusion that Article 13(2) does not control an amendment of the Constitution, it must be held that all previous amendments to the Constitution, so far made, could not be challendged on the ground of repugnancy to Article 13(2). It follows that any amendment of the Constitution cannot be challenged on that ground and that would be true not only of the 24th Amendment but also the 25th Amendment, and the 29th Amendment.

1285. The question still survives whether the 25th Amendment and the 29th Amendment are invalid because as contended by Mr. Palkhivala, an essential feature of the Constitution has been substantially affected. The argument proceeds on the assumption that in the absence of any express limitation on the power of amendment, all the provisions in the Constitution are liable to be amended. He agrees, on this assumption, that even fundamental rights may be some what abridged if that is necessary. In this connection, he referred to the first amendment by which Articles 15 and 19 were amended and in both these cases the amendment did abridge the fundamental rights. Similarly he conceded that Articles 31-A and 31-B were amendments where by the rights in landed estates were extinguished or substantially affected, but that was in the interest of agrarian reform, a fact of supreme importance in the Indian polity which could not have been ignored for long and to which the Ruling party was committed for a long time. Thus although there had been amendments which abridged fundamental rights, these amendments in his submission did not go to the length of damaging or destroying the fundamental rights. According to him they had not reached the 'core' of the rights. In other words, his submission is that there are some very good and desirable things in the Constitution. One of them is fundamental rights, and though these fundamental rights could be abridged some what, it was not permissible to affect by amendment the core of the fundamental rights, including the core of the right to property. For this argument he relies on the basic scheme of the Constitution as first promulgated and contends that any Amendments made thereafter, including the 24th Amendment, would not affect his argument, because, according to him, every one of them must be evaluated on the principles and concepts adopted in that basic scheme. His further submission was that if such a core of a fundamental right is damaged or destroyed by an amendment, such an amendment is illegal and, therefore, liable to be struck down by this court as the guardian of the Constitution. It necessarily follows from the submission that Mr. Palkhivala wanted this court to decide whether by any particular amendment the core of an essential feature like a fundamental right has been damaged or destroyed—undoubtedly a terrifying responsibility for this court to undertake. It may appear as very odd that while the framers of the constitution did not think it necessary to expressly exclude even one provision of the Constitution from being amended, they still intended that this court, as the guardian of the Constitution, should make parts of it unamendable by implying limitations on the Amending power. Indeed this court is a guardian of the Constitution in the sense that it will not permit its contravention by any of its instrumentalities, but it cannot constitute itself a guardian against change constitutionally effected.

1286. Though the argument had a wide sweep, namely, that the several essential features catalogued by Mr. Palkhivala were not liable to be damaged or destroyed, in the ultimate result the case really boils down to whether the core of the fundamental right to property has been damaged or destroyed principally by the 25th Amendment and, if so, whether there was any implied or inherent limitation on the amending power which prohibited such an amendment. The several essential features listed by Mr. Palkhivala do not come into the picture in the present case. It is not the case that by the recent 25th Amendment either the sovereignty of India is affected or the Republican form of Government has been destroyed. One of the several essential features listed by him is fundamental rights. Amongst fundamental rights also most are untouched by the amendment. The 25th Amendment deals principally with property rights and Articles 14, 19 and 31 in relation to them. By that amendment chiefly two things are sought to be accomplished: (1) There shall be no right to receive 'compensation', as judicially interpreted, for a State acquisition for a public purpose, but only to receive an 'amount', (2) A law made to achieve the aims of equitable distribution of community resources or for the prevention of concentration of wealth and means of production shall not be challenged on the ground of repugnancy to Articles 14, 19 and 31. Since it is not the practice of this court to decide questions which are not in immediate controversy it would not be proper to pronounce whether this or that particular so-called essential features can or cannot be damaged or destroyed by amendment. But since it is argued on behalf of the State that there can be no limitations on the amending power except those expressly provided in the Constitution and since that will affect our decision as to the 25th Amendment, we shall have to deal briefly with the question of implied and inherent limitations with special reference to fundamental rights including property rights.

1287. Whatever one may say about the legitimacy of describing all the rights conferred in Part III as essential features, one thing is clear. So far as the right to property is concerned, the Constitution, while assuring that no-body shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition [Article 31(1) and (2)], expressly declared its determination, in the interest of the common good, to break up concentration of wealth and means of production in every form and to arrange for redistribution of ownership and control of the material resources of the community. See: Article 39(*b*) and (*c*). If anything in the Constitution deserves to be called an essential feature, this determination is one. That is the central issue in the case before us, however dexterously it may have been played down in the course of an argument which painted the gloom resulting by the denial of the fundamental rights under Articles 14, 19 and 31 in the implementation of that determination. The Constitution had not merely stopped at declaring this determination but actually started its implementation from the commencement of the Constitution itself by incorprating clauses (4) and (6) under Article 31, the first two clauses of which spelt out the fundamental right to property. Apart from what Pandit Jawaharlal Nehru said about the Article in the Constitution Assembly Debates—and what he said was not at all sympathetic to Mr. Palkhivala's argument before us—the fundamental right to receive compensation under clause (2), as then framed, was completely nullified by clauses (4) and (6) in at least one instance of concentration of wealth and material resourcess viz., Zamindaris and landed estates. These clauses were deliberately inserted in the original Article 31 leaving no manner of doubt that Zamindaris and Estates were sought to be abolished on payment of even illusory compensation. The various States had already passed laws or were in the process of passing laws on the subject, and specific provision was made in the two clauses securing such laws from challange on the ground that they were not acquired by the State for a public purpose or that adequate compensation was not paid. The first case under the Bihar Land Reforms Act, 1950, *State of Bihar* v. *Kameshwar Singh*[79] shows that the law was highly unjust (from the prevailing point of view of 'Justice') and the compensation payable was in some cases purely illusory. (See Mahajan, J., p. 936). And yet by virtue of Article 31(4) there could be no challenge to that Act and other similar laws on those grounds. By oversight, challenge to such laws under Articles 14 and 19 had not been expressly excluded, and so when the case was pending in this court, the first amendment Act was passed inserting Articles 31-A and 31-B by which, to take no chances, a challenge based on all fundamental rights in Part III was wholly excluded. The course taken by the Constitution and its first Amendment leaves no doubt that Zamindaris and Estates were intended to be expropriated from the very beginning and no 'core' with regard to payment of compensation was sought to be safeguarded. By the time the 4th Amendment was made in 1955, it became apparent that the challenge to any scheme of redistribution or breaking up of concentration of property was confined generally to Articles 14, 19 and 31, and hence Article 31-A was amended. By the amendment all intermediaries, including small absentee landlords, were permitted to be eliminated and challenge to Article 31-A was excluded only under Articles 14, 19 and 31. In short, rights in landed agricultural property were extinguished without a thought to the necessity of paying fair compensation. In a real sense concentration of wealth in the form of agricultural lands was broken and community resources were distributed. On the other hand, a protectionist economic system, reinforced by controls, followed in the realm of trade and industry with a view to achive greater production of goods and services led to other forms of concentration of wealth and means of production in the wake of Independence. So comes the 25th Amendment, the object of which is the same viz. implementation of Article 39(*b*) and (*c*). It has made clear that owners of property when it is acquired for a public purpose are not entitled to compensation as interpreted by this court, and any law made with the aforesaid object cannot be challenged on the grounds arising out of Articles 14, 19 and 31. In principle, there is no difference in Article 31-A and the new Article 31-C inserted by the 25th Amendment. In trying to support his arguments on the core principle of essential features Mr. Palkhivala tried to play down the role of Article 31(4) and (6) and Article 31-A excusing them on the ground that they related to very necessary agrarian reforms to which the majority party in the Constituent Assembly was for years before the Constitution, committed. But that is not a legal argument. Article 31(4), (6) and Article 31-A clearly show that community interests were regarded as supreme and those articles were only a step in the implementation of the directive principle in Article 39(*b*) and (*c*). (Compare the observations of Das, J., in 1952 SCR 889 at pages 996 to 999). The Constitution definitely refused to accept the 'core' principle with regard to property rights, if property was required to be expropriated in the common interest in pursuance of the Directive Principles. The mood of the majority party is reflected in the speech of Pandit Govind Vallabh Pant, the then Chief Minister of Uttar Pradesh. Speaking in the Constituent Assembly on Article 31 and after justifying the provision of Article 31(4) and (6) in relation to laws regarding Zamindaris and agricultural estates (there were 20 lakh Zamindars, according to him, in U. P. alone) he said "I presume that if at any time this legislature chooses to nationalize industry, and take control of it, whether it be all the industries or any particular class of it, such as the textile industry or mines, it will be open to it to pass a law and to frame the principles for such purpose, and those principles will be invulnerable in any court. They will not be open to question, because the only condition for disputing them, as has been pointed out by Shri Alladi, (Krishnaswamy Iyer) one of the most eminent jurists which our country has ever produced, is this, that it should be a fraud on the Constitution". (See *Constituent Assembly Debates*, Vol. IX, page 1289). It shows that Article 31 (4),(6) were the first step as applied to land legislation, in the direction of implementing the directive principle of Article 39(*b*) and (*c*), and it was only a matter of time when the Principles would be applied to other types of concentration of wealth and its distribution. As Mahajan, J., observed in *State of Bihar* v. *Kameshwar Singh* (supra) at pages 929-30, our Constitution raised the obligation to pay compensation for compulsory acquisition of property to the status of a fundamental right. As the same time by specifically inserting clauses (4) and (6) in Article 31, it made the issues of public purpose and compensation prescribed in Article 31(2) non-justiciable in some specified laws dealing with concentration and distribution of wealth in the form of landed agricultural property. This clearly negatived the idea of protecting concentration of wealth in a few hands as an essential feature of the Constitution. Hidayatullah, J., was saying practically the same thing when he remarked in *Golak Nath's case* (supra) that it was an error to include property rights in Part III and that they were the weakest of fundamental rights. (p. 887)

---

[79] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 354.

1288. I have already discussed the amplitude of power conferred by the amending clause of the Constitution. In countries like America and Australia where express limitations have been imposed in the amending clause itself there is substantial authority for the view that even these express limitations can be removed by following the procedure laid down in the amending clause. According to them this could be done in two steps the first being to amend the amending clause itself. It is not necessary for us to investigate the matter further because Article 368 does not contain any express limitation. On the other hand, the power is wide enough even to amend the provisions of Article 368. (See: Proviso (*e*) of that Article). In other words, Article 368 contains unqualified and plenary powers to amend the provisions of the Constitution including the Amending clause. Prima facia, to introduce implied prohibitions to cut down a clear affirmative grant in a Constitution would be contrary to the settled rules of construction. (See the dissenting judgment of Issacs and Rich, JJ., in *McCawley* v. *The King*, 26 CLR 43-68, approved by the Privy Council in 1920 AC 691).

1289. When such an amending clause is amended without affecting the power of amendment will principally involve the Amending procedure. It may make amendment easier or more difficult. The procedure may also differ substantially. Parliament may be eliminated from the process leaving the amendment to the States. The proviso might be dropped, enlarging the role of the Parliament. On the other hand, the Parliament and State Assemblies may be divested of the function by providing for a referendum plebiscite or a special convention. While, thus, the power remains the same, the instrumentalities may differ from time to time in accordance with the procedure prescribed. Hidayatullah, J., with respect, was right in pointing out that the power to amend is not entrusted to this or that body. The power is generated when the prescribed procedure is followed by the instrumentalities specified in the Article. Since the instrumentalities are liable to be changed by a proper amendment it will be inaccurate to say that the Constituent Assembly had entrusted the power to any body. If the authority which is required to follow the procedure is the Parliament for the time being, it may be convenient to describe Parliament as the authority to whom the power is granted or entrusted, but strictly that would be inaccurate, because there is no grant to any body. Whichever may be the instrumentality for the time being, the power remains unqualified.

1290. If the theory of implied limitations is sound—the assumption made being that the same have their origin in the rest of the constitutional provisions including the Preamble and the fundamental rights—then these limitations must clog the power by whatever agency it is exercised. The rest of the Constitution does not change merely because the procedure prescribed in Article 368 is changed. Therefore, the implied limitations should continue to clog the power. Logically, if Article 368 is so amended as to provide for a convention or a referendum, the latter will be bound to respect the implied limitations—a conclusion which Mr. Palkhivala is not prepared to accept. He agrees with the jurists who hold that a convention or a referendum will not be bound by any limitations. The reason given is that the people directly take part in a referendum or, through their elected representatives, in a convention. Even in *Golak Nath's case* (supra) it was accepted that any part of the constitution including the fundamental rights could be amended out of existence by a Constituent Assembly.

1291. The argument seems to be that a distinction must be made between the power exercised by the people and the power exercised by Parliament. In fact Mr. Palkhivala's whole thesis is that the Parliament is a creature of the Constitution and the limitation is inherent in its being a constituted authority. We have already examined the question and shown that where the people have withdrawn completely from the process of Amendment, the Constituent body to whom the power is entrusted and exercise the power to the same extent as a Constituent Assembly and that the power does not vary according to the Agency to whom the power is entrusted. Therefore, this reason also viz. that Parliament is a constituted body and, therefore, it suffers from inherent limitations does not hold good.

1292. From the conclusion that the power of Amendment remains unqualified by whomesoever it is exercised, it follows that there can be no implied or inherent limitations on the Amending power. If a special convention admittedly does not suffer from limitations, any other constitutent body cannot be subject to it.

1293. The leading majority judgment in *Golak Nath's case* (supra) had seen some force in this doctrine of implied limitations (808), but did not find it necessary to decide on the issue. To remove all doubts on that score the 24th Amendment is now suitably amended. Its first clause says that Parliament may amend any provision of the Constitution notwithstanding anything in it. Therefore, in the matter of amendment Parliament may not, now, be inhibited by the other express provisions of the Constitution, which would mean that it may also ignore all implications arising therefrom.

1294. Where power is granted to amend the amending power, as in our Constitution, there is no limit to the extent this may be done. It may be curtailed or 'enlarged'. This is well illustrated in *Ryan* v. *Lennox.*[80] Under the Irish State Constitution Act of 1922, the Parliament (Oireachtas) had been given power to amend the Constitution under Article 50 of the Act. Under that Article, amendments during the first eight years of the Constitution, could be validly made without having recourse to a referendum unless specially demanded by the persons, and in the manner specified in Article 47, but amendments made after that period had to be approved in every case by a referendum and the people. By a constitutional amendment of 1928 (Amendment No. 10) the compulsion of Article 47 was got rid of, and by an amendment of 1929 (Amendment No. 16) made within the eight years period already referred to, the period of 8 years was extended to 16 years. The result was that the Constitution now authorized the Parliament to amend by ordinary legislation its Constitution for the period of 16 years from the commencement of the Constitution without being required to have recourse to a referendum. In 1931 by a further Amendment (Amendment No. 17) extensive alterations were made by which inter alia, personal liberty was curtailed, denying trial by Jury or by the regular courts. Ryan who was one of the victims of the new law applied to the High Court for a writ of habeas corpus on the ground that the several amendments were invalid, especially No. 16 by which the period of 8 years had been extended to 16 years. If Amendment No. 16 was invalid, that would have automatically resulted in Amendment No. 17 being invalid, having been made after the first period of 8 years. The High Court (three Justices) unanimously held that all the Amendments were valid. In appeal to the Supreme Court that decision was confirmed by a majority, Kennedy, Chief Justice, dissenting. One of the chief contentions directed against Amendment No. 16 was that the Parliament could not have 'enlarged' its power from 8 to 16 years to change the Constitution without a referendum by ordinary legislation. This contention was rejected by the majority. Kennedy, C. J., took a different view of the amendment. He held that Article 50 did not provide for the amending of the amendatory power, conceding that otherwise the power could have been so 'enlarged'. Since there is no dispute in our case that by reason of clause (*e*) of proviso of Article 368 power is given to amend the amendatory power, it was open to Parliament to 'enlarge' the power by amendment. If it is assumed—and we have shown there is no ground to make such an assumption that there was some implied limitation to be derived from other provisions of the Constitution, that limitation, if any, is now removed by the non-obstante clause in Clause 1 of the amended Article 368.

---

[80] 1935 Irish Reports, 170.

1295. It is of some interest to note here that in a case which later went to the Privy Council, *Moore* v. *Attorney-General for the Irish State*,[81] and in which a constitutional amendment made by the Irish Parliament in 1933 (Amendment No. 22) was challenged, Mr. Greene (Later Lord Greene) conceded before the Privy Council that Amendment No. 16 of 1929 was valid and their Lordships observed (494) "Mr. Wilfied Greene for the petitioners rightly conceded that Amendment No. 16 was regular and that the validity of these subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum". The question of validity of Amendment No. 16 was so vital to the petitioner's case that it is impossible to believe that a counsel of the standing of Lord Greene would not have challenged the same and, in the opinion of their Lordships, 'rightly'. According to Keith the judgment of Kennedy, C. J., in *Ryan's case* (supra) was wrong. See: *Letters on Imperial Relations*: *Indian Reform Constitutional and International Law*, 1916-1935, page 157.

1296. The importance of *Ryan's case* (supra) lies in the fact that though Article 50 of the Irish Free State Constitution did not expressly say that Article 50 itself is liable to be amended, no less than five judges of the Irish Courts held it could be amended though the amendment resulted in the 'enlargement' of the power of the Irish Parliament to amend the constitution. How wide the power was further established in *Moore's case* (supra) which held that Amendment No. 22 was valid, though by this Amendment even the Royal Prerogative regarding appeals to the Privy Council was held to have been abrogated by the combined operation of the Statute of Westminster and the Constitutional Amendment, in spite of Article 50 having been originally limited by the terms of the Scheduled Treaty of 1922. In our case Article 368 authorizes its own amendment and such an amendment can enlarge the powers of the Parliament, if such was the need.

1297. Apart from reasons already given, we will consider, on first principles, whether the constituent body is bound to respect the so-called 'essential feature' of the fundamental rights especially that of right to property. The fact that some people regard them as good and desirable is no adequate reason. The question really is whether the constituent body considers that they require to be amended to meet the challenge of the times. The philosophy of the amending clause is that it is a safety-valve for orderly change and if the good and desirable feature has lost its appeal to the people the constituent body would have undoubtedly the right to change it.

1298. Indeed, if there are some parts of the Constitution which are made expressly unamendable the constituent body would be incompetent to change them, or if there is anything in the provisions of the Constitution embodying those essential features which by necessary implication prohibit their amendment those provisions will also become unamendable. The reason is that in law there is no distinction between an express limitation and a limitation which must be necessarily implied. Secondly, it is an accepted rule of construction that though a provision granting the power does not contain any limitation that may not be conclusive. That limitation may be found in other parts of the statute. But we have to remember that Article 368 permits the amendment of all the provisions of the Constitution

[81] 1935 AC 484.

expressly. And if that power is to be cut down by something that is said in some other provision of the Constitution the latter must be clear and specific. As far back as 1831 Tindal, C. J., delivering the unanimous opinion of the Judges in the House of Lords in *Warburton* v. *Loveland*,[82] observed at page 500 "No rule of construction can require that, when the words of one part of a statute convey a clear meaning……………………it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the other provisions of the Act". To control the true effect of Article 368 "you must have a context even more plain or at least as plain as the words to be controlled". See: Jessel M. R. in *Bentley* v. *Rotherham*.[83] Neither the text nor the context of the articles embodying the fundamental rights shows that they are not exposed to Article 368. Moreover, when we are concerned with a power under a statute, it is necessary to remember the following observations of Lord Selborne in *Reg.* v. *Burah*,[84] at pp. 904 and 905, "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions". Similarly Earl Loreburn in *Attorney-General for the Province of Ontario* v. *Attorney-General for the Dominion of Canada*.[85] observed at page 583 "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act". The only course which is open to courts is to determine the extent of power expressly granted after excluding what is expressly or by necessary implication excluded. That is the view of the Privy Council in *Webb* v. *Outrim*[86] the effect of which is summarized by Issacs, J., in *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Company Limited and Others*[87] at p. 150 as follows:

> "……………we should state explicitly that the doctrine of 'Implied prohibition' against the exercise of a power once ascertained in accordance with ordinary rules of construction, was definitely rejected by the Privy Council in *Webb* v. *Outrim* (supra)."

1299. Having regard to the rules of construction relating to power referred to above, we have to see if either the provisions relating to the fundamental right to property or any related provisions of the Constitution contain words of prohibition or limitation on the amending power. Right to property is sought to be safeguarded under Article 31, and Article 19 deals with freedoms having relation to property, profession, trade and business. We find nothing in these provisions to suggest that

---

[82] (1831) II Dow & Clark, 480.
[83] (1876-77) 4 Ch D 58 8(592).
[84] (1878) 3 App Cas 889.
[85] 1912 App Cas 571.
[86] 1907 AC 81.
[87] 28 CLR 129.

SCC Online

rights to property cannot be abridged by an amendment of the Constitution. On the other hand, Article 31(1) suggests that one can be deprived of property under the authority of law. The right to receive compensation under clause (2) of Article 31, as it stood at the time of the commencement of the Constitution, had been considerably cut down by several provisions contained in the other clauses of that Article. Article 31(4) and (6) not only envisaged breaking-up of concentration of landed property in the hands of Zamindars and the like but also expropriation without payment of just compensation. That necessarily called for the exclusion of Articles 14, 19 and 31, because no scheme for expropriation or extinguishment of rights in property would succeed without their exclusion. Thereafter there has been a spate of amendments curtailing property rights and none of them seems to have been challenged on the ground that there was something in the provisions themselves (apart from the fact that they affect a 'transcedental' fundamental right) suggesting an implied or inherent limitation on the amending power. The last sentence from Lord Loreburn's judgment quoted above embodies a well-known rule of construction which is useful when the text of a statute is ambiguous. Where the text is clear and unambiguous there can be no recourse to the context or the scheme of the Act; nor can the context or the scheme be utilized to make ambiguous what is clear and unambiguous. Moreover the rule does not permit in cases of ambiguity recourse to the scheme and context which is unhelpful in resolving the ambiguity. It does not authorise investing the scheme and context with an effect of delimiting the power referred to in the 'ambiguous' text, if the scheme and the context do not contain words which expressly or by necessary implication have the effect. All this is important in connection with the construction of the word 'Amendment' in Article 368. We have already shown that the word 'Amendment' used in the context of a Constitution is clear and unambiguous. Therefore, the scheme and the context are irrelevant. The scheme and the context on which reliance is placed before us consist principally of the alleged dominating status of the Preamble and the alleged transcedental character of the fundamental rights neither of which helps us in the legal interpretation of the word 'Amendment'. They are being pressed into service merely to create an ambiguity where there is none. Actually the context and scheme are here used to cut down the ambit and scope of the expression 'amendment of the Constitution' by investing them with that effect where neither expressly nor by necessary implication do they contain any prohibition or limitation on the Amending power. Therefore, as a matter of construction no implied limitations can be inferred from the Preamble or the fundamental rights which, being as much part of a legal document as any other provision of the Constitution, are subject to equal consideration in the matter of legal construction. To be relevant, the scheme and context must say or reasonably suggest something with regard to Amending power.

1300. Mr. Palkhivala sought to draw support for his doctrine of implied limitations from the Preamble. According to him the Preamble sets out the objectives of the Constitution and, therefore, any tampering with these objectives would destroy the identity of the Constitution, and since an amendment of the Constitution, howsoever made, must preserve the identity of the Constitution the objectives of the Preamble should be treated as permanent and unamendable. On that basis he further contended that since the fundamental rights are mostly an elaboration of the objectives of the Preamble, it was implied that the fundamental rights or at least, the essence of them was not liable to be damaged or destroyed by an amendment.

1301. The submission that the fundamental rights are an elaboration of the Preamble is an over-statement and a half truth. According to the Preamble the people of India have given unto themselves the Constitution to secure to all its citizens: (*a*) JUSTICE social, economic and political; (*b*) LIBERTY of thought, expression, belief, faith and worship; (*c*) EQUALITY of status and of opportunity; and to promote among the citizens; (*d*) FRATERNITY assuring the dignity of the individual and the unity of the Nation. There is no doubt that the Constitution is intended to be a vehicle by which the goals set out in it are hoped to be reached. Indeed, being a part of the Constitution, strictly speaking, it is amendable under Article 368. But we will assume that the people of India will not be rash enough to amend the glorious words of the Preamble; and as long as the Preamble is there the Governments will have to honour the Preamble and the Constitution will have to continue as a vehicle which would lead us to the goals. But to say that the fundamental rights are an elaboration of these goals would be a caricature. Most of the fundamental rights may be traced to the principles of LIBERTY and EQUALITY mentioned in the Preamble. But whereas the concepts of LIBERTY and EQUALITY are mentioned in absolute terms in the Preamble the fundamental rights including the several freedoms are not couched in absolute terms. They reflect the concepts of LIBERTY and EQUALITY in a very attenuated form with several restrictions imposed in the interest of orderly and peaceable Government.

1302. The pre-eminent place in the Preamble is given to JUSTICE social, economic and political, and it is obvious that without JUSTICE the other concepts of LIBERTY, EQUALITY and FRATERNITY would be illusory. In a democratic country whose institutions are informed by JUSTICE—social, economic and political, the other three concepts of LIBERTY, EQUALITY and FRATERNITY will be automatically fostered. Social and political Justice takes care of Liberty; and Justice, social and economic, takes care of Equality of status and of opportunity. Therefore, even in the Directive Principles the supreme importance of Justice—social, economic and political—is highlighted in Article 38, in which the State is given a mandate to strive to promote the welfare of the people by securing and protecting a social order in which Justice—social, economic and political shall inform all the institutions of the National life. Where genuine and honest efforts are made in the implementation of this mandate the content and ambit of the concepts of Liberty and Equality are bound to increase and expand. As Wade has pointed out in his *Introduction to Dicey's Law of the Constitution*, at page LXXXII "Liberty today involves the ordering of social and economic conditions by Governmental authority, even in those countries where political, if not economic equality of its citizens, has been attained. Without expansion of that authority, which Federal States must find more difficult to achieve than a unitary State like the United Kingdom, there is inevitably a risk that the constitution may break down before a force which is not limited by considerations of constitutional niceties". Again he points out at pages XXIV and XXV that the modern House of Commons is a forum in which both parties put forward incessant demands for the remedying of some social or economic-ill of the body politic…… ……….and the changing conditions have all been brought about by the action of Parliament. In doing that, Wade says, it could not be denied that legislation has shifted the emphasis on individual liberty to the provision of services for the public good. In the terms of our Constitution especially the Preamble and Article 38, the shift of emphasis is from individual Liberty to Justice—social, economic and political.

1303. The absolute concepts of Liberty and Equality are very difficult to achieve as goals in the present day organized society. The fundamental rights have an apparent resemblance to them but are really no more than rules which a civilized government is expected to follow in the governance of the country whether they are described as fundamental rules or not. England developed these rules in its day to day Government under the rule of law and does not make a song and dance about them. British rulers of India tried to introduce these rules in the governance of this country, as proof of which we can point out to the vast mass of statutes enacted during the British period which have been continued, practically without change, under our Constitution. No body can deny that when Imperial interests were in jeopardy, these rules of good government were applied with an unequal hand, and when the agitation for self rule grew in strength these rules were thrown aside by the rulers by resorting to repressive laws. It was then that people in this country clamoured for these elementary human rights. To them their value in our social and political life assumed such importance that when the Constitution was framed we decided that these rules of civilized government must find a place in the Constitution, so that even our own governments at the Centre and the States should not overlook them. That is the genesis of our fundamental rights. The importance of these rights as conferred in the Constitution lies not in their being something extraordinary but in the bar that the Constitution imposed against laws which contravened these rights and the effective remedy supplied under Article 32. Indeed the framers of the Constitution took good care not to confer the fundamental rights in absolute terms because that was impractical. Knowing human capacity for distorting and misusing all liberties and freedoms, the framers of the Constitution put restrictions on them in the interest of the people and the State thus emphasizing that fundamental rights i. e., rules of civilized government are liable to be altered, if necessary, for the common good and in the public interest.

1304. And yet, as we have seen above, even in U. K. individual liberty as it was understood a generation or two ago is no longer so sacrosanct, especially, in relation to ownership of property. Several statutes in the economic and social field have been passed which while undoubtedly impinging upon the individual liberties of a few have expanded social and economic justice for the many. If U. K. had stood staunchly by its Victorian concept of *laissez faire* and individual liberty, the progress in social and economic justice which it has achieved during the last half a century would have been difficult. Even so, though very much more advanced than our country, U. K. cannot claim that it has fully achieved social and economic justice for all its citizens. But there is no doubt that the parties which form the Governments there have always this goal in view though their methods may be different. In a country like ours where we have, on the one hand, abject poverty on a very large scale and great concentration of wealth on the other, the advance towards social and economic justice is bound to be retarded if the old concept of individual liberty is to dog our footsteps. In the ultimate analysis, liberty or freedoms which are so much praised by the wealthier sections of the community are the freedom to amass wealth and own

SCC Online

property and means of production, which, as we have already seen, our Constitution does not sympathise with. If the normal rule is that all rules of civilized government are subject to public interest and the common weal, those rules will have to undergo new adjustments in the implementation of the Directive Principles. A blind adherence to the concept of freedom to own disproportionate wealth will not take us to the important goals of the Preamble, while a just and sympathetic implementation of the Directive Principles has at least the potentiality to take us to those goals, although on the way, a few may suffer some diminution of the unequal freedom they now enjoy. That being the philosophy underlying the Preamble the Fundamental Rights and the Directive Principles taken together, it will be incorrect to elevate the fundamental rights as essentially an elaboration of the objectives of the Preamble. As a matter of fact a law made for implementing the Directive Principles of Article 39(*b*) and (*c*), instead of being contrary to the Preamble, would be in conformity with it because while it may cut down individual liberty of a few, it widens its horizon for the many.

1305. It follows that if in implementing such a law the rights of an individual under Articles 14, 19 and 31 are infringed in the course of securing the success of the scheme of the law, such an infringement will have to be regarded as a necessary consequence and, therefore, secondary. The Preamble read as a whole, therefore, does not contain the implication that in any genuine implementation of the Directive Principles, a fundamental right will not suffer any diminution. Concentration and control of community resources, wealth and means of production in the hands of a few individuals are, in the eyes of the Constitution, an evil which must be eradicated from the social organization, and hence, any fundamental right, to the extent that it fosters this evil, is liable to be abridged or taken away in the interest of the social structure envisaged by the Constitution. The scheme of the fundamental rights in Part III itself shows that restrictions on them have been placed to guard against their exercise in an evil way.

1306. Nor is there anything in the Preamble to suggest that the power to amend the fundamental right to property is cut down. Actually there is no reference to the right to property. On the other hand, while declaring the objectives which inspired the framers of the Constitution to give unto themselves the Constitution which, they hoped, would be able to achieve them, they took good care to provide for the amendment of "this Constitution". It was clearly implied that if the operative parts of the Constitution failed to put us on the road to the objectives, the Constitution was liable to be appropriately amended. Even the Preamble, which, as we know, had been adopted by the Constituent Assembly as a part of the Constitution (*Constituent Assembly Debates*, Vol. X, p. 456) was liable to be amended. Right to property was, perhaps, deliberately not enthroned in the Preamble because that would have conflicted with the objectives of securing to all its citizens, justice, social, economic and political, and equality of opportunity, to achieve which Directive Principles were laid down in Articles 38 to 51. Moreover the Preamble, it is now well settled—can neither increase or decrease the power granted in plain and clear words in the enacting parts of a statute. See: *The Berubari Union and Exchange of Enclaves*[88] at pp. 281-282. Further, the legislature may well-intend that the enacting part do extend beyond the apparent ambit of the Preamble. See: *Secretary of State* v. *Maharajah of Bobbili*.[89] As a matter of fact if the enacting part is clear and unambigous it does not call for construction. In *Sprague's case* (supra) the Supreme Court of America had been called upon to construe Article V, the amending clause, so as to cut down the amending power by implications arising out of certain other provisions of the Constitution itself. Replying to the argument the court observed , "the United State asserts that Article V is clear in statement and in meaning contains no ambiguity and calls for no resort to rules of construction. A mere reading demonstrates that this is true". These observations apply with greater force to our amending clause namely Article 368, for in Article V of the American Constitution there was some room for play of argument on the basis of alternative methods permitted for the ratification of the proposed amendment. On the basis of the alternative methods provided in Article V—One by the State Legislature and the other by the State convention—It was argued that the State convention was the appropriate method to the exclusion of the State Legislature, because the prohibition amendment (18th Amendment) directly affected personal liberty. Where personal liberty was involved, it was submitted, the people alone through their convention could ratify an amendment, especially, as under Article X the people had reserved to themselves the powers which were not expressly conferred on the federal Constitution. This argument was rejected by the Supreme Court on the ground that the language of Article V was clear and unambiguous and though alternative methods were provided for, the ultimate authority as to which alternative method should be adopted was the Congress and if the Congress chose the method of ratification by the State Legislature there was an end of the matter. The court observed: "In the Constitution words and phrases were used in their normal and ordinary as distinct from technical meaning. When the intention is clear, there is no room for construction and no excuse for interpolation". By interpolation the court specifically meant an addition in the nature of a proviso to Article V limiting the power of the Congress as to the choice of the body it would make for the purposes of ratification.

---

[88] (1960)3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

[89] AIR 1943 Mad 529 (PC) at 536: AIR 1919 PC 52: 46 IA 306.

1307. Reference was made to certain cases with a view to show that though there were no words suggesting a limitation on a power, implied limitations or prohibitions are noticed by courts. In a recent Australian case of *Victoria* v. *The Commonwealth*[90] the question arose as to the power of the Commonwealth Parliament under Section 51(*ii*) of the Constitution to make laws with respect to taxation under the Pay-roll Tax Assessment Act, 1941-1969. It was unanimously held by the court that the Commonwealth Parliament had the power. During the course of aguments, the question arose, which has been troubling the Australian courts for years, whether there were implied limitations on Commonwealth legislative power under the Constitution in view of the fact that the Preamble to the Constitution recited that the people had agreed "to unite in one indissoluble federal Commonwealth under the Crown". In *Amalgamated Engineers case* (supra), already referred to, which had been regarded for a long time as the final word on the question, the alleged implied prohibition or limitation had been rejected. The question was held to be a question of construction with regard to the extent of power and if the power was ascertained from the express words, there could be no further limitation thereon by implication. But in the case referred to above, while three Judges accepted that view as still good, the other four were of the contrary opinion. Whichever view is correct that really makes no difference to the question before us. We are concerned with the amending power. In the Australian case the Judges were concerned with legislative power and that had to be ascertained within the four corners of the Constitution by which the power had been created and under which it had to be exercised. There was room for construction on the basis of the words and structure of the Constitution, especially, the Preamble which was not liable to be amended by the Commonwealth. On the other hand, since the power to amend our Constitution is a superior power it cannot be bound by any provision of the Constitution itself, the obvious reason being that even such a provision is amendable under the Constitution. *In re The Initiative and Referendum Act*,[91] it was held by the Privy Council that the British North America Act, 1867, Section 92, head 1, which empowers a Provincial legislature to amend the Constitution of the Province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown. By the Initiative and Referendum Act the legislative assembly of Manitoba—A Province in Canada—compelled the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the Constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. It was held that this directly affected the office of the Lieutenant-Governor as part of the Legislature and since the amendment to the Constitution had the effect of affecting that office which was expressly excepted from the amending power the law was void. It is thus seen that there was no question of an implied limitation. In the other case cited before us namely *Don John Francis Douglas Liyanage & Others* v. *The Queen*,[92] no question of amending the Constitution arose. There by an ordinary act of the Legislature made in 1962 under Section 29(1) of the Ceylon (Constitution and Independence) Orders in Council, 1946-47 an attempt was made to partially vest in the Legislature and the executive the judicial powers of the judges which vested in them under a separate Imperial Charter, viz. the Charter of Justice, 1833 the effective operation of which was recognized in the Constitution of 1946-47. It was held that the Act was ultra vires the Constitution. Some more cases like *Ranasinghe's case*[93] *Taylor* v. *Attorney General of Queensland*;[94] *Mangal Singh* v. *Union of India*,[95] were cited to show that constitutional laws permit implications to be drawn where necessary. Nobody disputes that proposition. Courts may have to do so where the implication is necessary to be drawn. In *Ranasinghe's case* (supra) the Privy Council is supposed to have expressed the opinion on a construction of Section 29 of the Ceylon (Constitution) Order in Council, 1946 that sub-sections (2)and (3) are unamendable "under the Constitution". In the first place, the observation is obiter, and it is doubtful if their Lordships intended to convey that even under Section 29(4), they were unamendable. A plain reading of the latter provision show they were amendable by a special majority. Secondly, in an earlier portion of the judgment Provision 29(2) and (3) are described as 'entrenched', the plain dictionary meaning of which is that they are not to be repealed except under more than stringent conditions. See also Wade's *Introduction to Dicey*, pages XXXVI to XXXVII. Jennings in his *Constitution of Ceylon* (1949) points out at page 22 that the limitations of 29(2) and (3) can be altered or abridged by the special procedure under Section 29(4). Similarly Wheare in *Constitutional Structure of the Commonwealth* 1960 reprinted in 1963, pages 83-84. In any event, that was a pure matter of construction on a reading of sub-sections (1) to (4) of Section 29 together. In *Taylor's case* (supra) the question for consideration was as to the interpretation of the expression 'Constitution of such legislature' in Section 5 of the Colonial Laws Validation Act, 1865. At the time in question the Legislature consisted of a lower house and an upper house and it was held that the expression 'Constitution of such legislature' was wide enough to include the conversion of a bicameral legislature into a unicameral one. Isaacs, J., also held 'legislature' in the particular context meant the houses of legislature and did not include the Crown. In *Mangal Singh's case* (supra) it was merely held that if by law made under Article 4 of our Constitution a state was formed, that state must have legislative, executive and judicial organs which are merely the accoutrements of a state as understood under the Constitution. The connotation of a 'state' included these three organs. That again was a matter of pure construction. None of the cases sheds any light on the question with which we are concerned viz. whether an unambiguous and plenary power to amend the provisions of the Constitution, which included the Preamble and the fundamental rights, must be frightened by the fact that some superior and transcedental character has been ascribed to them.

---

[90] 45 ALJR 251.

---

[91] 1919 AC 935.
[92] 1967 AC 259.
[93] 1965 AC 172.
[94] 23 CLR 457.
[95] (1967)2 SCR 109 at 112: AIR 1967 SC 944: (1968)1 SCJ 240.

1308 On the other hand, in America where implied limitations were sought to be pressed in cases dealing with constitutional amendments, the same were rejected. In *Sprague's case* (supra) the Supreme Court rejected the contention of implied limitation supposed to arise from some express provisions in the constitution itself. Referring to this case, Dodd in *Cases in Constitutional Law*, 5th edition, pages 1375-1387 says "This case it is hoped puts an end to the efforts to have the court examine into the subject-matter of constitutional amendment". In *The National Prohibition cases*[96] decided earlier, the Prohibition Amendment (18th) was challenged, as the briefs show, on a host of alleged implied limitations based on the constitution, its scheme and its history. The opinion of the court did not accept any of them, in fact, did not even notice them. American jurists are clearly of the opinion that the Supreme Court had rejected the argument of implied limitations. See for example Cooley *Constitutional law*, 4th edition, 46-47; Burdick *Law of American Constitution*, pp. 45 to 48.

1309. The argument that essential features (by which Mr. Palkhivala means "essential features, basic elements or fundmental principles") of the constitution, though capable of amendment to a limited extent are not liable to be damaged or destroyed is only a variation on the argument previously urged before this Court on the basis of the so-called "spirit of the constitution" which had been rejected as far back as 1952. See: *State of Bihar* v. *Kameshwar Singh* (supra). That case arose out of the Bihar Land Reforms Act, 1950 which was pending in the Bihar Legislature at the time of the commencement of the constitution. After it became law it was reserved for the consideration of the President who gave assent to it. Thus it became one of the laws referred to in Article 31(4) of the Constitution and in virtue of that provision it could not be called in question on the ground that contravened the provisions of Clause 2 of Article 31. Under that law Zamindari was abolished and the lands vested in the State. The Zamindars received what was described as illusory compensation As there was danger of challenge under Articles 14, 19 and 31, the constitution was amended to incorporate Article 31-A and Article 31-B to take effect from the date of the commencement of the constitution and this Act along with similar other Acts were included in the Ninth Schedule. In *Sankari Prasad's case* (supra) the amendment was held valid and when the case came before this court the arguments

---

[96] 65 Law Ed. 994.

SCC Online

became limited in scope. Mr. P. R. Das who appeared for the Zamindars tried to skirt the bar under Article 31(4) by relying on Entry 36, List II and Entry 42 in List III arguing that the law in so far as it did not acquire the Zamindaries for a public purpose or make provision for adequate compensation was incompetent under those entries. Dr. Ambedkar who appeared for other Zamindars took a different stand. In the words of Patanjali Sastri, C. J., "He maintained that a constitutional prohibition against compulsory acquisition of property without public necessity and payment of compensation was deducible from what he called the 'spirit of the constitution', which, according to him, was a valid test for judging the constitutionality of a statute. *The Constitution, being avowedly one for establishing liberty, justice and equality and a government of a free people with only limited powers, must be held to contain an implied prohibition against taking private property without just compensation and in the absence of a public purpose.* (Emphasis is supplied). He relied on certain American decisions and text books as supporting the view that a constitutional prohibition can be derived by implication from the spirit of the Constitution where no express prohibition has been enacted in that behalf. Articles 31-A and 31-B barred only objections based on alleged infringements of the fundamental rights conferred by Part III, but if, *from the other provisions thereof, it could be inferred that there must be a public purpose and payment of compensation before private property could be compulsorily acquired by the State, there was nothing in the two articles aforesaid to preclude objection on the ground that the impugned Acts do not satisfy these requirements and are, therefore, unconstitutional*". (Emphasis supplied). This argument was rejected in these words "In the face of the limitations on the State's power of compulsory acquisition thus incorporated in the body of the Constitution, from which 'estates' alone are excluded, it would, in my opinion, be contrary to elementary canons of statutory construction to read, by implication, those very limitations into Entry 36 of List II, alone or in conjunction with entry 42 of List III, of the Seventh Schedule, or to deduce them from 'the spirit of the Constitution', and that too, in respect of the very properties excluded". The argument was that having regard to the Preamble and the fundmental rights which established liberty, justice and equality and a government of a free people with only limited powers, taking of private property without just compensation and in the absence of a public purpose was unconstitutional, and this conclusion should be drawn by implied prohibition in pite of Article 31(4), 31-A and 31-B expressly barring challenge on those very grounds. In other words, an express provision of the Constitution validating a State law was sought to be nullified on the basis of 'essential' features and basic principles' underlying the Preamble and the fundamental rights, but the attempt was negatived. I see no distinction between Dr. Ambedkar's argument in the above case and the case before us, because the plenary power of amendment under Article 368 is sought to be limited by implications supposed to arise from those same 'essential features and basic principles'.

1310. A Legislature functioning under a constitution is entitled to make a law and it is not disputed that such a law can be amended in any way the legislature likes by addition, alteration or even repeal. This powei to amend is implicit in the legislative power to make laws. It can never be suggested that when the legislature amends its own statute either directly or indirectly it is inhibited by any important or essential parts of that statue. It can amend the important, desirable, parts as unceremoniously as it can any other unimportant parts of the statute. That being so, one does not see the reasonableness of refusing this latitude to a body which is specifically granted the unqualified power to amend the Constitution. While the legislature's power to amend operates on each and every provision of the statute it is difficult to see why the amending clause in a Constitution specifically authorising the amendment of the constitution should stand inhibited by any part of the constitution. Essential parts and unessential parts of a constitution should make no difference to the amending power [Compare passage from *McCawley's case* (supra) already quoted at p. 43-4]. That a legislature can repeal an act as a whole and the constituent boby does not repeal the constitution as a whole is not a point of distinction. A legislature repeals an act when it has outlived its utility. But so far as a constitution is concerned it is an organic instrument continuously growing in utility and the question of its repeal never arises as long as orderly change is possible. A constitution is intended to last. Legislative acts do not have that ambition. It is the nature and character of the constitution as a growing, organic, permanent and sovereign instrument of government which exclude the repeal of the constitution as a whole and not the nature and character of the amending power.

1311. Since the 'essential features and basic principles' referred to by Mr. Palkhivala are those culled from the provisions of the constitution it is clear that he wants to divide the constitution into parts—one of provisions containing the essential features and the other containing non-essential features. According to him the latter can be amended in any way the Parliament likes, but so far as the former provisions are concerned, though they may be amended, they cannot be amended so as to damage or destroy the core of the essential features. Two difficulties arise, who is to decide what are essential provisions and non-essential provisions? According to Mr. Palkhivala it is the court which should do it. If that is correct, what stable. standard will guide the court in deciding which provision is essential and which is not essential? Every provision, in one sense, is an essential provision, because if a law is made by the Parliament or the State Legislatures contravening even the most insignificant provision of the constitution, that law will be void. From that point of view the courts acting under the constitution will have to look upon its provisions with an equal eye. Secondly, if an essential provision is amended and a new provision is inserted, which in the opinion of the constituent body, should be presumed to be more essential than the one repealed, what is the yardstick the court is expected to employ? It will only mean that whatever necessity the constituent body may feel in introducing a change in the constitution, whatever change of policy that body may like to introduce in the Constitution, the same is liable to be struck down if the court is not satisfied either about the necessity or the policy. Clearly this is not a function of the courts. The difficulty assumes greater proportion when an amendment is challenged on the ground that the core of essential feature is either damaged or destroyed. What is the standard? Who will decide where the core lies and when it is reached? One can understand the argument that particular provisions in the constitution embodying some essential features are not amendable at all. But the difficulty arises when it is conceded that the provision is liable to be amended, but not so as to touch its 'core'. Apart from the difficulty in determining where the 'core' of an 'essential feature' lies, it does not appear to be suffiently realized what fantastic results may follow in working the constitution. Suppose an amendment of a provision is made this year. The mere fact that an amendment is made will not give any body the right to come to this court to have the amendment nullified on the ground that it affects the core of an essential feature. It is only when a law is made under the amended provision and that law affects some individual's right, that he may come to this Court. At that time he will first show that the amendment is bad because it affects the core of an essential feature and if he succeeds there he will automatically succeed and the law made by the Legislature in the confidence that it is protected by the amended constitution will be rendered void. And such a challenge to the amendment may come several years after the amendment which till then is regarded as a part of the constitution. In other words, every amendment, however innocuous it may seem when it is made is liable to be struck down several years after the amendment although all the people have arranged their affairs on the strength of the amended constitution. And in dealing with the challenge to a particular amendment and searching for the core of the essential feature the court will have to do it either with reference to the original constitution or the constitution as it stood with all its amendments up-to date. The former procedure is clearly absurd because the constitution has already undergone vital changes by amendments in the meantime. So the challenged amendment will have to be assessed on the basis of the constitution with all its amendments made prior to the challenged amendment. All such prior amendments will have to be accepted as good because they are not under challenge, and on that basis Judges will have to deal with the challenged amendment. But the other amendments are also not free from challenge in subsequent proceedings, because we have already seen that every amendment can be challenged several years after it is made, if a law made under it affects a private individual. So there will be a continuous state of flux after an amendment is made and at any given moment when the court wants to determine the core of the essential feature, it will have to discard, in order to be able to say where the core lies, every other amendment because these amendments also being unstable will not help in the determination of the core. In other words, the courts will have to go by the original constitution to decide the core of an essential feature ignoring altogether all the amendments made in the meantime, all the transformations of rights that have taken place after them, all the arrangements people have made on the basis of the validity of the amendments and all the laws made under them without question. An argument which leads to such obnoxious results can hardly be entertained. In this very case if the core argument were to be sustained several previous amendments will have to be set aside because they have undoubtedly affected the core of one or the other fundamental right. Prospective overruling will be the order of the day.

1312. The argument of implied limitations in effect invites us to assess the merits and demerits of the several provisions of the Constitution as a whole in the light of social, political and economic concepts embodied therein and determine on such an assessment what is the irreducible minimum of the several features of the Constitution. Any attempt by amendment, it is contended, to go beyond such irreducible minimum—also called the 'core' of essential features—should be disallowed as invalid. In other words, we are invited to resort to the substantive due process doctrine of the Supreme Court of America in the interpretation of a Constitutional Amendment. That doctrine was rejected long ago by this court [*Gopalan's case*] (supra) even in its application to ordinary legislation. See 1950 SCR 88 (Kania, C.J. 110) (Das, J., 312). The argument does not have anything to do with the meaning of the expression 'amendment of the Constitution' because it is conceded for the purpose of this argument that 'amendment of this Constitution' means 'amendment of all provisions by way of addition, alteration or repeal'. What is contended, is that by the very implications of the structure, general principles and concepts embodied in the Constitution, an amendment can go only thus far and no further. In other words, the scope of amendment is circumscribed not by what the constituent body thinks, but by what the Judges ultimately think is its proper limits. And these limits, it is obvious, will vary with individual Judges and, as in due process, the limits will be those fixed by a majority of Judges at one time, changed, if necessary, by a bigger majority at another. Every time an amendment is made of some magnitude as by the Twenty-fifth Amendment we will have, without anything to go on, to consider how, in our opinion, the several provisions of the Constitution react on one another, their relative importance from our point of view, the limits on such imponderable concepts as liberty, equality, justice, we think proper to impose, whether we shall give preponderence to Directive Principles in one case and fundamental rights in another—in short, determine the 'spirit of the Constitution' and decide how far the amendment conforms with that 'spirit'. We are no longer, then, construing the words of the Constitution which is our legitimate province but determining the spirit of the Constitution—a course deprecated by this court in *Gopalan's case* (supra) at pp. 120-121. When concepts of social or economic justice are offered for our examination in their interaction on provisions relating to right to property—matters traditionally left to legislative policy and wisdom, we are bound to founder "in labyrinths to the character of which we have no sufficient guides."

1313. It is true that Judges do judicially determine whether certain restrictions imposed in a statute are reasonable or not. We also decide questions involving reasonableness of any particular action. But Judges do this because there are objective guides. The Constitution and the legislatures specifically leave such determination to the higher courts, not because they will be always right, but because the subject-matter itself defies definition and the legislatures would sooner abide by what the judges say. The same is true about limits of delegated legislation or limits of legislative power when it encroaches on the judicial or any other field. Since the determination of all these questions is left to the higher judiciary under the Constitution and the law, the judges have to apply themselves to the tasks, however difficult they may be, in order to determine the legality of any particular legislative action. But all this applies to laws made under the Constitution and have no relevance when we have to deal with a constitutional Amendment. The Constitution supplies the guides for the assessment of any statute made under it. It does not supply and guides to its own amendment which is entirely a matter of policy.

1314. The 'core' argument and the division into essential and non-essential parts are fraught with the greatest mischief and will lead to such insuperable difficulties that, if permitted, they will open a Pandora's box of endless litigation creating uncertainty about the provisions of the Constitution which was intended to be clear and certain. Every single provision embodies a concept, a standard, norm or rule which the framers of the Constitution thought was so essential that they included it in the Constitution. Every amendment thereof will be liable to be assailed on the ground that an essential feature or basic principle was seriously affected. Our people have a reputation of being a litigious lot. We shall be only adding to this.

1315. When an amendment is successfully passed, it becomes part of the Constitution having equal status with the rest of the provisions of the Constitution. If such an amendment is liable to be struck down on the ground that it damages or destroys an essential feature, the power so claimed should, a fortiori, operate on the Constitution as it stands. It will be open to the court to weigh every essential feature like a fundamental right and, if that feature is hedged in by limitations, it would be liable to be struck down as damaging an essential feature. Take for example personal liberty, a fundamental right under the Constitution. If the court holds the opinion that the provision with regard to preventive detention in Article 22 damages the core of personal liberty it will be struck down. The same can be said about the freedoms in Article 19. If this Court feels that the provision with regard to, say State monopolies damages the fundamental right of trade of a citizen, it can be struck down. In other words, if an amendment which has become part of the Constitution is liable to be struck down because it damages an essential feature it should follow that every restriction originally placed on that feature in the Constitution would necessarily come under the pruning knife of the courts.

1316. In short, if the doctrine of unamendability of the core of essential features is accepted, it will mean that we add some such proviso below Article 368. "Nothing in the above Amendment will be deemed to have authorised an Amendment of the Constitution, which has the effect of damaging or destroying the core of the essential features, basic principles and fundamental elements of the Constitution as may be determined by the Courts". This is quite impermissible.

1317. It is not necessary to refer to the numerous authorities cited before us to show that what are described as some of the essential features are not unamendable. It will be sufficient to refer to only a few. Bryce in his book: "*The American Commonwealth*". New and revised edition, Vol. I says at pages 366-67 with reference to Article V of the American Constitution "But looking at the Constitution simply as a legal document, one finds nothing in it to prevent the adoption of an amendment providing a method for dissolving the existing Federal tie, whereupon such method would be applied so as to form new Unions, or permit each State to become an absolutely sovereign and independent commonwealth. The power of the people of the United States appears competent to effect this, should it ever be desired, in a perfectly legal way, just as the British Parliament is legally competent to redivide Great Britain into the sixteen or eighteen independent kingdoms which existed within the island in the eighth century". Randall in his revised edition, 1964, *The Constitutional Problems under Lincoln*, says at page 394 with reference to Article V "Aside from the restriction concerning the 'equal suffrage' of the States in the Senate, the Constitution, since 1808, has contained no unamendable part, and it designates no field of legislation that may not be reached by the amending power. An amendment properly made becomes 'valid, to all intents and purposes, as part of this Constitution', having as much force as any other article. There is no valid distinction between 'the Constitution itself' and the amendments. The Constitution at any given time includes all up to the latest amendments, and excludes portions that have not survived the amending process. We should think not of 'the Constitution and its amendments,' but of "the Constitution as amended'. This is especially true when we reflect that certain of the amendments supplant or construe portions of the original document". Cooley in his book, *The General Principles of Constitutional Law in the United States of America*, fourth edition, says at pages 46-47 "Article V of the Constitution prohibits any amendment by which any State 'without its consent shall be deprived of its equal suffrage in the Senate'. Beyond this there appears to be no limit to the power of amendment. This, at any rate, is the result of the decision in the so-called *National Prohibition case* (supra)...... ....The amendment was attacked on the grounds that it was legislative in its character, an invasion of natural rights and an encroachment on the fundamental principles of dual sovereignty, but the contention was overruled. The decision totally negatived the contention that 'An Amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government, nor relinguish to the State those which already have been granted to it'. Quick and Garran writing in the '*Annotated Constitution of the Australian Commonwealth*' (1901) observe as follows at p. 989 with regard to the amending clause of the Constitution namely Section 128. 'It may be concluded that there is no limit to the power to amend the Constitution, but that it can only be brought into action according to certain modes prescribed. We will consider the modes and conditions of Constitutional reforms further; meanwhile it is essential to grasp the significance and comprehensiveness of the power itself. For example, the Constitution could be amended either in the direction of strengthening or weakening the Federal Government; strengthening it, by conferring on it new and additional powers; weakening it, by taking away powers. The Constitution could be amended by reforming the structure of the Federal Parliament and modifying the relation of the two Houses; by increasing or diminishing the power of the Senate in reference to Money Bills; by making the Senate subject to dissolution at the same time as the House of Representatives. It is even contended by some daring interpreters that the Constitution could be amended by abolishing the Senate. It could certainly be amended by remodelling the Executive Department, abolishing what is known as Responsible Government, and introducing a new system, such as that which prevails in Switzerland, according to which the administration of the public departments is placed in the hands of officers elected by the Federal legislature. The Constitution could be amended by altering the tenure of the judges, by removing their appointment from the Executive, and authorizing the election of judges by the Parliament or by the people. The Constitution could be amended in its most vital part, the amending power itself, by providing that alterations may be initiated by the people, according to the plan of the Swiss Popular Initiative; that proposed alterations may be formulated by the Executive and submitted to the people that proposed alterations may, with certain constitutional exceptions, become law on being approved of by a majority of the electors voting, dispensing with the necessity of a majority of the States".

1318. On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the Amendments which are in question here must be deemed to be valid. We cannot question their policy or their wisdom.

1319. Coming to the actual amendments made in the Constitution by the Twenty-fifth Amendment Act, we find in the first place that the original clause (2) of Article 31 is recast to some extent by deleting any reference to 'compensation' in cases of compulsory acquisition and requisition for a public purpose. The fundamental right now is not to receive 'compensation' which this court construed to mean 'a just equivalent' but to receive an "amount" which the legislature itself may fix or which may be determined in accordance with the principles as may be specified by law. Then again the "amount" may be given in cash or in such manner as the law may specify. The principal objection to the amendment is that the clause arms the legislature with power to fix any amount which it considers fit and such fixation may be entirely arbitrary having no nexus whatsoever with the property of which a person is actually deprived. In similar cases, it is submitted, the amount fixed may be more in one and very much less in another depending entirely on the whim of the legislature. Conceivably the amount may be illusory having regard to the value of the property. The principles for determining the amount may equally be arbitrary and unrelated to the deprivation. Therefore, it is contended, the amendment is bad. It is difficult to understand how an amendment to the Constitution becomes invalid because the Constitution authorizes the legislatures to fix an "amount" or to specify the principles on which the "amount" is to be determined instead of fixing the "compensation" or specifying the principles for determining "compensation". Even compensation ultimately is an "amount". All that the amendment has done is to negative the interpretation put by this court on the concept of compensation. Clause (2) recognizes the fundamental right to receive an amount in case of compulsory acquisition or requisition and all that it wants to clarify is that the fundamental right is not to receive compensation as interpreted by this court but a right to receive an amount in lieu of the deprivation which the legislature thinks fit. It is not the case that if a fair amount is fixed for the acquisition or fair principles to determine it are laid down, the amendment would still be invalid. The contention is that it becomes invalid because there is a possibility of the abuse of the power to fix the amount. There is no power which cannot be abused. All Constitutions grant power to legislatures to make laws on a variety of subjects and the mere possibility of the power being used unwisely, injurously or even abused is not a valid ground to deny legislative power. See *Bank of Toronto* v. *Lambe*.[97] If that is the position with regard to legislative power, there does not appear to be any good reason why the possibility of abuse of it by the Legislature should inhibit an amendment of the Constitution which gives the power. Whether a particular law fixes an amount which is illusory or is otherwise a fraud on power denying the fundamental right to receive an amount specifically conferred by clause (2) will depend upon the law when made and is tested on the basis of clause (2). One cannot anticipate any such matters and strike down an amendment which, in all conscience, does not preclude a fair amount being fixed for payment in the circumstances of a particular acquisition or requisition. The possibility of abuse of a power given by an amendment of the Constitution is not determinative of the validity of the amendment.

1320. The new clause (2-B) inserted in Article 31 having the consequence of excluding the application of Article 19(1)(*f*) to a law referred to in clause (2) of Article 31 is merely a re-statement of the law laid down by this court after the Constitution came into force. The mutual exclusiveness of Article 19(1)(*f*) and Article 31(2) had been recognized by this court in a series of cases. See *Sitabati Debi & Another* v. *State of West Bengal & Another*.[98] That principle is now embodied in the new amendment.

1321. The only substantial objection to the Twenty-fifth Amendment is based on the new Article 31C inserted in the Constitution by Section 3 of the Twenty-fifth Amendment Act. The new article is as follows:

---

[97] 1887, Vol XII—Appeal Cases 575 at pages 586-587.

[98] (1967)2 SCR 949.

> "31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

1322. Ignoring the proviso for the moment, one finds that the main clause of the article falls into two parts. The first part provides that a law of a particular description shall not be deemed to be void on the ground that it affects injurously somebody's fundamental rights under Articles 14, 19 and 31. The second part provides that if such a law contains a particular declaration, courts shall not entertain a particular kind of objection.

1323. In the first place, it should be noted that what is saved by Article 31C is a law i. e. a law made by a competent legislature. Secondly since Article 31C comes under the specific heading 'right to property' in Part III dealing with fundamental rights it is evident that the law must involve right to property. That it must of necessity do so in apparent from the description of the law given in the article. The description is that the law gives effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39. That Article is one of the several Articles in Part IV of the Constitution dealing with Directive Principles of State Policy. Article 37 provides that though the Directive Principles are not enforceable by any court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows from this that the Governments and Legislatures are enjoined to make laws giving effect to the Directive Principles. We are immediately concerned with the Directive Principles contained in Article 39(*b*) and (*c*) namely, that the State shall direct its policy towards securing (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In short clause (*b*) contemplates measures to secure what is known as equitable distribution of community resources and clause (*c*) contemplates measures for preventing concentration of wealth and means of production in a few private hands. Read along with Article 38 and other principles in this Part, they justify the conclusions of Granville Austin in his *Indian Constitution: Cornerstone of a Nation*—that our Constitution is informed by social democratic principles. See! pages 41-52 of the book. The final conclusion he came to is expressed in this way:

> "By establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian Governments to find a middle way between individual

> Liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate the powers of all men equally for contributions to the common good.'' page 52.

The philosophy which informs the Constitution looks on concentration of wealth and means of production as a social evil because such concentration, resulting in the concentration of political and economic power in the hands of a few private individuals, not only leads to unequal freedom, on the one hand, but results, on the other, in undermining the same in the case of many. In such conditions it is widely believed that the goals of Equality and Justice, social, economic and political, become unreal, and since the Constitution itself directs that laws may be made to inhibit such conditions it is inevitable that these laws aimed at the reduction of unequal freedoms enjoyed by a few will impair to some extent their fundamental rights under Articles 14, 19 and 31. That would be justified even on the 'core' theory of Mr. Palkhivala because he admits the possibility of an abridgement of a fundamental right in similar cases. Therefore, Article 31-C provides, even as Article 31-A provided many years ago, that such laws should not be called in question on the grounds furnished by Articles 14, 19 and 31. If a law is made with a view to giving effect to the Directive Principles mentioned in Article 39(*b*) and 39(*c*) the law is in conformity with the direct mandate of the Constitution and must be deemed to be Constitutional. The effect of the first part of Article 31-C is the same as if, a proviso had been inserted below Article 13(2) or each of the several Articles 14, 19 and 31 excluding its application to the particular type of law mentioned in Article 31-C. If the law does not genuinely purport to give effect to the specified Directive Principles it will not be secure against the challenge under Articles 14, 19 and 31. Indeed since the Directive Principles are couched in general terms they may present some difficulty in judging whether any individual law falls within the ambit of the description given in Article 31-C but such a difficulty is no reason for denying the validity of the amendment Courts had no difficulty in deciding whether any particular law did fall under Article 31-A or not.

1324. The real difficulty is raised by the second part of the Article 31-C which provides "No law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy''. The contention is that if any law makes a declaration as stated, that is conclusive of the fact that it is covered by Article 39(*b*) or (*c*) and courts will be debarred from entertaining any objection on the ground that it is not so covered. In other words, it is submitted, the declaration when made in a law whether genuinely falling under Article 39(*b*) or (*c*) or not, will conclude the issue and the courts will be debarred from questioning the declaration. The result is, according to the submission, that the legislatures may with impunity make a law contravening provisions of the Constitution and by the simple device of a declaration insert the law as an exception to Articles 14, 19 and 31 — i. e., in other words amend the Constitution which the legislature cannot do. The Constitution, it is pointed out may be amended only in the way prescribed in Article 368 and no other and, therefore Article 31-C authorising an amendment in a way other than the one laid down in Article 368, which still forms part of the Constitution with full force, is invalid.

1325. On behalf of the Union, however, it is claimed that the new Article 31-C does not have the effect attributed to it on behalf of the petitioners.

It is, submitted, that Article 3-1C does not prevent judicial review as to whether the law referred to therein is of the description it maintains it is. If on a consideration of its true nature and character the court considers that the legislation is not one having a nexus with the principles contained in Article 39(*b*) and (*c*), it will not be saved under Article 31-C. The sole purpose of the declaration, according to the submission, is to remove from the scope of judicial review a question of a political nature the reason for it being, as explained in *Beauharanis* v. *Illinois*.[99] "The legislative remedy in practice might not mitigate the evil or might itself give rise to new problems which would only manifest once again the paradox of reform. It is the price to be paid for the trial and error inherent in legislative efforts to deal with obstinate social issues".

1326. It appears to us that the approach suggested on behalf of the Union is the correct approach to the interpretation of Article 31-C.

1327. The State's functional policy is to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life. (Article 38). That is the goal of the State policy. As practical steps, the State is commanded in the next following articles from Articles 39 to 51 to direct its policy towards securing some aims which, being well known concepts of social democratic theory, are described as 'principles'. See for example the marginal note of Article 39. Compendiously these are described as Directive Principles of State Policy under the heading of Part IV.

1328. We are concerned with Article 39(*b*) and (*c*). The State is commanded, in particular, to direct its policy towards securing two aims, one described in (*b*) and the other in (*c*). In directing its policy towards securing the aims, the State will evidently have to make laws. A description of such a law is given in the first part of Article 31-C—as a law giving effect to the policy of the State towards securing the principles (aims) specified in Article 39(*b*) or (*c*). If a law truly answers that description it will be secure against a challenge under Articles 14, 19 and 31; otherwise not. When such a challenge is made, it will be the obvious duty of the court to ascertain on an objective consideration of the law whether it falls within the description. What the Court will have to consider is whether it is a law which can reasonably be described as a law giving effect to the policy of the State towards securing the aims of Article 39(*b*) or (*c*). That is an issue which is distinct from the other issue whether the law does not give effect to the policy of the State towards securing the said aims. A law reasonably calculated to serve a particular aim or purpose may not actually serve that aim or purpose; and it is this latter issue which is excluded from judicial review. In doing so the declaration does no more than what the courts themselves have been always, saying viz. that they are not concerned with the wisdom or policy of the legislation. Prohibition laws—For example in U. S. A. and elsewhere though made in order to give effect to the policy of the State to secure the eradication of the evil of drink did not have that effect. That may have been so because the law was inadequate or because the law gave rise to problems which were unforeseen. But that did not impair the genuineness of the law as being reasonably calculated to achieve a certain result. The two questions are different. One involves the process of identification of the type of legislation by considering its scope and object, its pith and substance. The other involves a process of evaluation by considering its merits and defects,

---

[99] 343 US 250.

SCC Online

the adequacy or otherwise of the steps taken to implement it or their capability of producing the desired result. A law made to give effect to the State's policy of securing eradication of the drink evil can be properly identified as such, if such indentification is necessary to be made by a court in order to see the application of a constitutional provision. But it is an entirely different proposition to say that the law does not actually give effect to the State's policy of securing the eradication of drink. That would require an enquiry which courts cannot venture to undertake owing to lack of adequate means of knowledge and sources of information. An enquiry like that of a Commission, will lead to debatable questions as to the adequacy of the provisions of the law, its deficiencies, the sufficiency and efficiency of tha executive side of the Government to implement it effectively, the problems that arise in the coure of implementation of the law and the like, all of which do not legitimately fall within the ambit of an enquiry by a court. The problems are problems of legislative policy. It is for the legislature to decide what should go into the law to give effect to its policy towards securing its purpose. The legislature will have to consider the divergent views in the matter and make its own choice as to how it can effectuate its policy. The courts are not concerned with that aspect of the matter and even if a law is considered a failure, courts, cannot refuse to give effect to the same. The declaration does not more than forbid such an enquiry by the courts which the courts themselves would not have undertaken. The declaration is only by way of abundant caution.

1329. No other ground is precluded from judicial review under Article 31-C. It was rightly cocended on behalf of the union that the court in deciding whether the law falls within the general description given of it in Article 31-C will be competent to examine the true nature and character of the legislation, its design and the primary matter dealt with, its object and scope. See e g. *Charles Russell* v. *The Queen.*[1] If the court comes to the conclusion that the above object of the legislation was merely a pretence and the real object was descrimination or something other than the object specified in Article (*b*) and (*c*), Article 31-C would not be attracted and the validity of the Statute would have to be tested independently of Article 31-C. Similarly as observed in *Attorney-General* v. *Queen Insurance Co.*[2] "If the legislation ostensibly under one of the powers conferred by the constitution is in truth and fact really to accomplish an unauthorised purpose the court would be entitled to tear the veil and decide according to the real nature of the statute".

1330. In that view of the true nature of Article 31-C it can be said that the amendment is invalid.

1331. The Twenty-fifth Amendment Act is, therefore, valid.

1332. By the Twenty-ninth Amendment, the two Kerala Acts challenged in this petition were included in the Ninth Schedule. Like other Acts included in that Schedule they are immune from challenge by reason of the protection given to the Schedule by Article 31-B. It was sought to be argued that unless the Acts related to agrarian reform, implicit in the words 'without prejudice to the generality of the provisions contained in Article 31-A' with which Article 31-B opens, the protection was not available. That argument has been rejected previously. See for example *N. B. Jeejeebhoy* v. *Assistant Collector, Thana.*[3] Actually the argument does not amount to a challenge to the validity of the Amendment, but an attempt to show that in spite of the Amendment, the two laws would not be saved by Article 31-B. The Twenty-ninth Amendment is not different from several similar Amendments made previously by which Statutes were added from time to time to the Ninth schedule and whose validity has been upheld by this Court. The Twenty-ninth amendment is, therefore, valid.

---

[1] 1882 (VII) Appeal Cases, 829 (838-840)

[2] (1878)3 Appeal Cases, 1090.

[3] (1965) 1 SCR 636: AIR 1965 SC 1096.

1333. My conclusions are:

(1) The power and the procedure for the amendment of the Constitution were contained in the unamended Article 368. An Amendment of the Constitution in accordance with the procedure prescribed in that Article is not a'law' within the meaning of Article 13. An Amendment of the Constitution abridging or taking away a fundamental right conferred by Part III of the Constitution is not void as contravening the provisions of Article 13(2). The majority decision in *Golak Nath* v. *State of Punjab* (supra) is, with respect, not correct.

(2) There were no implied or inherent limitations on the amending power under the unamended Article 368 in operation over the fundamental rights. There can be none after its amendment.

(3) The Twenty-fourth, the Twenty-fifth and the Twenty-ninth Amendment Acts are valid.

1334. The case will now be posted before the regular bench for disposal in accordance with law.

Khanna, J.—Questions relating to the validity of the Constitution (Twenty-fourth Amendment) Act, Constitution (Twenty-fifth Amendment) Act and Constitution (Twenty-ninth Amendment) Act, as well as the question whether the Parliament acting under Article 368 of the Constitution can amend the provisions of Part III of the Constitution so as to take away or abridge fundamental rights arise for determination in this petition under Article 32 of the Constitution. A number of other important questions, to which reference would be made hereafter, have also been posed during discussion, and they would be dealt with at the appropriate stage. Similar questions arise in a number of other petitions, and the counsel of the parties in those cases have been allowed to intervene.

1336. The necessary facts may now be set out, while the details which have no material bearing for the purpose of this decision can be omitted. Kerala Land Reforms Act, 1963 (Act 1 of 1964) as originally enacted was inserted as item No. 39 in the Ninth Schedule to the Constitution. The said Act was subsequently amended by Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969). The petitioner filed the present writ petition on March 21, 1970 challenging the constitutional validity of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969). The aforesaid Act was also challenged in a number of petitions before the Kerala High Court. A Full Bench of the Kerala High Court as per its decision in *V. N. Narayanan Nair* v. *State of Kerala*[28] upheld the validity of the said Act, except in respect of certain provisions. Those provisions were declared to be invalid. The State of Kerala came up in appeal to this Court against the judgment of the Kerala High Court in so far as that Court had held a number of provisions of the Act to be invalid. This Court dismissed the appeals of the State as per judgment, dated April 26, 1972.[29] Appeals filed by private parties against the judgment of the Kerala High Court upholding the validity of the other provisions too were dismissed. Some writ petitions filed in this Court challenging the validity of the above mentioned Act were also disposed of by this Court in accordance with its decision in the appeals filed by the State of Kerala and the private parties.

---

[28] ILR (1970) 2 Ker 315: AIR 1971 Ker 98: 1970 Ker LJ 638.

1337. The Kerala High Court as per judgment, dated October 21, 1970, declared some other provisions of the Kerala Land Reforms Act as amended by Act 35 of 1969 to be invalid and unconstitutional. After the above judgment of the High Court the Kerala Land Reforms Act was amended by Ordinance 4 of 1971 which was promulgated on January 30, 1971. The Kerala Land Reforms (Amendment) Bill, 1971 was thereafter introduced in the Legislative Assembly to replace the Ordinance. The Bill was passed by the Legislative Assembly on April 26, 1971 and received the assent of the President on August 7, 1971. It was thereafter published as the Kerala Land Reforms Act, 1971 (Act 25 of 1971) in the Gazette Extraordinary on August 11, 1971. By the Constitution (Twenty-ninth Amendment) Act, 1972 which was assented to by the President on June 9, 1972 the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969) and Kerala Land Reforms (Amendment) Act, 1971 (Act 25 of 1971) were included in the Ninth Schedule to the Constitution.

1337-A. The writ petition was amended twice. The first amendment was made with a view to enable the petitioner to impugn the constitutional validity of the Kerala Land Reforms (Amendment) Act (Act 25 of 1971). The second amendment of the petition was made with a view to include the prayer to declare the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments to the Constitution as unconstitutional, ultra vires, null and void.

1338. It may be mentioned that the Twenty-fourth Amendment related to the amendment of the Constitution. Section 2 of the Amendment Act added clause (4) in Article 13 as under:

> "(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

Section 3 of the Amendment Act read as under:

> "3. Article 368 of the Constitution shall be re-numbered as clause (2) thereof, and
>
> (*a*) for the marginal heading to that article, the following marginal heading shall be substituted, namely:—
>
> "Power of Parliament to amend the Constitution and procedure therefor,";
>
> (*b*) before clause (2) as so re-numbered, the following clause shall be inserted, namely:
>
> "(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provisions of this Constitution in accordance with the procedure laid down in this article,";

---

[29] (1972) 2 SCC 364.

(*c*) in clause (2) as so re-numbered, for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill," the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" shall be substituted;

(*d*) after clause (2) as so re-numbered, the following clause shall be inserted, namely:—

"(3) Nothing in Article 13 shall apply to any amendment made under this article."

We may not set out Articles 13 and 368 as they existed both before and after the amendment made by the Twenty-fourth Amendment Act:

Before the Amendment	*After the Amendment*
13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.	13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.	(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,	(3) In this article, unless the context otherwise requires,
(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;	(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(*b*) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.	(*b*) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
	(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

Before the Amendment	*After the Amendment*
	368. (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the proceedure laid down in this article.
368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :	(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be persented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill :
Provided that if such amendment seeks to make any change in—	Provided that if such amendment seeks to make any change in—
(*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or	(*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or
(*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or	(*b*) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or
(*c*) any of the Lists in the Seventh Schedule, or	(*c*) any of the Lists in the Seventh Schedule, or
(*d*) the representation of States in Parliament, or	(*d*) the representation of States in Parliament, or
(*e*) the provisions of this article,	(*e*) the provisions of this article,
the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
	(3) Nothing in Article 13 shall apply to any amendment made under this article."

1339. The Constitution (Twenty-fifth Amendment) Act, 1971 amended

Article 31 of the Constitution. The scope of the amendment would be clear from Section 2 of the Amendment Act which reads as under:—

> "2. In Article 31 of the Constitution,—
>
> (*a*) for clause (2), the following clause shall be substituted, namely:—
>
> "(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:
>
> Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause";
>
> (*b*) after clause (2-A), the following clause shall be inserted, namely:—
>
> "(2-B) Nothing in sub-clause (*f*) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).".''

The Constitution (Twenty-fifth Amendment) Act also added Article 31-C after Article 31-B as under:

> "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> "Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

1340. The Constitution (Twenty-ninth Amendment) Act, as mentioned earlier, inserted the following as Entries Nos. 65 and 66 respectively in the Ninth Schedule to the Constitution:

(*i*) The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969); and

(*ii*) The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).

1341. The question as to whether the fundamental rights contained in Part III of the Constitution could be taken away or abridged by amendment was first considered by this Court in the case of *Sri Sankari Prasad Singh Deo* v. *Union of India & Anr.*[30] In that case the appellant challenged the First Amendment of the Constitution. The First Amendment made changes in Articles 15 and 19 of the Constitution. In addition, it provided for insertion of two Articles, 31-A and 31-B, in Part III. Article 31-A provided that no law providing for acquisition by the State of any estate or of any such rights therein or the extinguishment or modification of any such right, shall be deemed to be void on the ground that it was inconsistent with or took away or abridged any of the rights conferred by any provisions in Part III. The word "estate" was also defined for the purpose of Article 31-A. Article 31-B provided for validation of certain Acts and Regulations which were specified in the Ninth Schedule to the Constitution. The said Schedule was added for the first time in the Constitution. The Ninth Schedule at that time contained 13 Acts, all relating to estates, passed by various Legislatures of the Provinces or States. It was provided that those Acts and Regulations would not be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by any provision of Part III. It further provided that notwithstanding any judgment, decree or order of any Court or Tribunal to the contrary, all such Acts and Regulations, subject to the power of any competent Legislature to repeal or amend them, would continue in force.

1342. The attack on the validity of the First Amendment was based primarily on three grounds. Firstly, that amendments to the Constitution made under Article 368 were liable to be tested under Article 13(2); secondly, that in any case as Articles 31-A and 31-B inserted in the Constitution by the First Amendment affected the powers of the High Court under Article 226 and of this Court under Articles 132 and 136, the Amendment required ratification under the proviso to Article 368 ; and thirdly, that Articles 31-A and 31-B were invalid on the ground that they related to matters covered by the State List. This Court rejected all the three contentions. It held that although "law" would ordinarily include constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power and constitutional law made in the exercise of constituent power. In the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to Constitution made in the exercise of constituent power. Article 13(2), as such, was held not to affect amendments made under Article 368. This Court further held that Articles 31-A and 31-B did not curtail the power of this Court and of the High Court and as such did not require ratification under the proviso contained in Article 368. Finally, it was held that Articles 31-A and 31-B were essentially amendments to the Constitution and the Parliament had the power to make such amendments. In consequence, the First Amendment to the Constitution was held to be valid.

1343. The second case in which there arose the question of the power of the Parliament to amend fundamental rights was *Sajjan Singh* v. *State of Rajasthan.*[31] In this case the Seventeenth Amendment made on June 29, 1964, was challenged. By the Seventeenth Amendment changes were made in Article 31-A of the Constitution and 44 Acts were included in the Ninth Schedule to the Constitution to give them complete protection from attack under any provision of Part III of the Constitution. One of the contentions advanced in *Sajjan Singh's case* (supra) was that, as Article 226 was likely to be affected by the Seventeenth Amendment, it required ratification under the proviso to Article 368 and that the decision in *Sankari Prasad's case* (supra) which had negatived such a contention required reconsideration. It was also urged that the Seventeenth Amendment was legislation with respect to land and the Parliament had no right to legislate in that respect. It was further argued that as the Seventeenth Amendment provided that Acts put in the Ninth Schedule would be valid in spite of the decision of the courts, it was unconstitutional. This Court by a majority of 3 to 2 upheld the correctness of the decision in *Sankari Prasad's case* (supra). This Court further held unanimously that the Seventeenth Amendment did not require ratification under the proviso to Article 368. The Parliament, it was held, in enacting the amendment was not legislating with respect to land and that it was open to Parliament to validate legislation which had been declared invalid by courts. By a majority of 3 to 2 the Court held that the power conferred by Article 368 included the power to take away fundamental rights guaranteed by Part III and that the power to amend was a very wide power which could not be controlled by the literal dictionary meaning of the word "amend". The word "law" in Article 13(2), it was held, did not include an amendment of the Constitution made in pursuance of Article 368. The minority, however, doubted the correctness of the view taken in *Sankari Prasad's case* (supra) to the effect that the word "law" in Article 13(2) did not include amendment to the Constitution made under Article 368.

---

[30] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[31] (1965) 1 SCR 933: AIR 1965 SC 845: (1965) 1 SCJ 377.

1344. The correctness of the decision of this Court in *Sankari Prasad's case* (supra) and of the majority in *Sajjan Singhs's case* (supra) was questioned in the case of *I. C. Golak Nath & Ors.* v. *State of Punjab & Anrs.*[32] The case was heard by a special bench consisting of 11 judges. This Court in that case was concerned with the validity of the Punjab Security of Land Tenures Act, 1953 and of the Mysore Land Reforms Act. These two Acts had been included in the Ninth Schedule to the Constitution by the Constitution (Seventeenth Amendment) Act, 1964. It was held by Subba Rao, C.J., Shah, Sikri, Shelat and Vaidialingam, JJ. (Hidayatullah, J. concurring) that fundamental rights cannot be abridged or taken away by the amending procedure in Article 368 of the Constitution. An amendment of the Constitution, it was observed, is "law" within the meaning of Article 13(2) and is, therefore, subject to Part III of the Constitution. Subba Rao, C.J. who gave the judgment on his own behalf as well as on behalf of Shah, Sikri, Shelat and Vaidialingam, JJ. gave his conclusions as under:

> "(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.
>
> (2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.
>
> (3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth

---

[32] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution."

Hidayatullah, J. summed up his conclusions as under:

"(*i*) that the Fundamental Rights are outside the amendatory process if the amendment seeks to *abridge or take away* any of the rights;

(*ii*) that *Sankari Prasad's case* (supra) [and *Sajjan Singh's case* (supra) which followed it] conceded the power of amendment over Part III of the Constitution on an erroneous view of Articles 13(2) and 368;

(*iii*) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;

(*iv*) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Article 13(2) in particular;

(*v*) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and

(*vi*) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Reforms Act, 1961 (X of 1962) as amended by Act XIV of 1965 are valid under the Constitution not because they are included in Schedule IX of the Constitution but because they are protected by Article 31-A and the President's assent."

As against the view taken by the majority, Wanchoo, Bachawat, Ramaswami, Bhargava and Mitter, JJ. gave dissenting judgments. According o them, Article 368 carried the power to amend all parts of the Constituion including the fundamental rights in Part III of the Constitution. An amendment, according to the five learned Judges, was not "law" for the purpose of Article 13(2) and could not be tested under that Article. The earned Judges accordingly reaffirmed the correctness of the decision in the cases of *Sankari Prasad* and *Sajjan Singh*. Some of the conclusions arrived at by Wanchoo, J., who gave the judgment on his own behalf as well as on behalf of Bhargava and Mitter, JJ., may be reproduced as under:

(*i*) The Constitution provides a separate part headed 'Amendment of the Constitution' and Article 368 is the only Article in that part.

There can, therefore, be no doubt that the power to amend the Constitution must be contained in Article 368.

(*ii*) There is no express limitation on power of amendment in Article 368 and no limitation can or should be implied therein. If the Constitution makers intended certain basic provisions in the Constitution, and Part III in particular, to be not amendable there is no reason why it was not so stated in Article 368.

(*iii*) The power conferred by the words of Article 368 being unfettered, inconsistency between that power and the provision in Article 13(2) must be avoided. Therefore in keeping with the unfettered power in Article 368 the word 'law' in Article 13(2) must be read as meaning law passed under the ordinary legislative power and not a constitutional amendment.

(*iv*) Though the period for which *Sankari Prasad case* (supra) has stood unchallenged is not long, the effects which have followed on the passing of State laws on the faith of that decision, are so overwhelming that the decision should not be disturbed, otherwise chaos will follow. This is the fittest possible case in which the principle of *stare decisis* should be applied.

(*v*) The doctrine of prospective overruling cannot be accepted in this country. The doctrine accepted here is that courts declare law and that a declaration made by a court is the law of the land and takes effect from the date the law came into force. It would be undesirable to give up that doctrine and supersede it with the doctrine prospective overruling.

The main conclusions of Bachawat, J. were as under:

(*i*) Article 368 not only prescribe the procedure but also gives the power of amendment.

(*ii*) The power to amend the Constitution cannot be said to reside in Article 248 and List I, Item 97, because if amendment could be made by ordinary legislative process Article 368 would be meaningless.

(*iii*) The contention that a constitutional amendment under Article 368 is a law within the meaning of Article 13 must be rejected.

(*iv*) There is no conflict between Articles 13(2) and 368. The two Articles operate in different fields, the former in the field of law, the latter in that of constitutional amendment.

(*v*) If the First, Fourth, Sixteenth and Seventeenth Amendment Acts are void they do not legally exist from their inception. They cannot be valid from 1951 to 1967 and invalid thereafter. To say that they were valid in the past and will be invalid in the future is to amend the Constitution. Such a naked power of amendment is not given to the Judges and, therefore, the doctrine of prospective overruling cannot be adopted.

We may now set out some of the conclusions of Ramaswami, J. as under:

(*i*) In a written Constitution the amendment of the Constitution is a substantive constituent act which is made in the exercise of the sovereign power through a predesigned procedure unconnected with ordinary legislation. The amending power in Article 368 is hence *sui generis* and cannot be compared to the law making power of Parliament pursuant to Article 246, read with Lists I and III. It follows that the expression 'law' in Article 13(2) cannot be construed as including an amendment of the Constitution which is achieved by Parliament in exercise of its sovereign constituent power, but must mean law made by Parliament in its legislative capacity under Article 246, read with List I and List III of the VII th Schedule.

(*ii*) The language of Article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatsoever. The use of the word 'fundamental' to describe the rights in Part III and the word 'guaranteed' in Article 32 cannot lift the fundamental rights above the Constitution itself.

(*iii*) There is no room for an implication in the construction of Article 368. If the Constitution-makers wanted certain basic features to be unamendable they would have said so.

(*iv*) It cannot be assumed that the Constitution-makers intended to forge a political strait-jacket for generations to come. Today at a time when absolutes are discredited, it must not be too readily assumed that there are basic features of the Constitution which shackle the amending power and which take precedence over the general welfare of the nation and the need for agrarian and social reform.

(*v*) If the fundamental rights are unamendable and if Article 368 does not include any such power it follows that the amendment of, say, Article 31 by insertions of Articles 31-A and 31-B can only be made by a violent revolution. It is doubtful if the proceedings of a new Constituent Assembly that may be called will have any legal validity for if the Constitution provides its own method of amendment, any other method will be unconstitutional and void.

(*vi*) It was not necessary to express an opinion on the doctrine of prospective overruling of legislation.

1345. Before dealing with Article 368, we may observe that there are wo types of constitutions, *viz.*, rigid and flexible. It is a frequently-held ut erroneous impression that this is the same as saying non-documentary or locumentary. Now, while it is true that a non-documentary constitution annot be other than flexible, it is quite possible for a documentary constiution not to be rigid. What, then, is that makes a constitution flexible r rigid? The whole ground of difference here is whether the process of onstitutional law-making is or is not identical with the process of orlinary law-making. The Constitution which can be altered or amenled without any special machinery is a flexible constitution. The Constiution which requires special procedure for its alteration or amendment is rigid constitution (See pp. 66-68 of the *Modern Political Constitutions* by C. F. Strong). Lord Birkenhead, L. C. adopted similar test in the Australian Queensland) case of *McCawley* v. *The King*[33] though he used the nomenlature controlled and uncontrolled constitutions in respect of rigid and lexible constitutions. He observed in this connection:

> "The difference of view, which has been the subject of careful analysis by writers upon the subject of constitutional law, may be traced mainly to the spirit and genius of the nation in which a particular

---

[33] 1920 AC 763.

> constitution has its birth. Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to there successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the Constitution."

1346. Let us now deal with Article 368 of the Constitution. As amendments in Articles 13 and 368 of the Constitution were made in purported exercise of the powers conferred by Article 368 in the form it existed before the amendment made by the Twenty-fourth Amendment, we shall deal with the Article as it was before that amendment. It may be mentioned in this context that Article 4, Article 169, Fifth Schedule, Para 7 and Sixth Schedule, Para 21 empower the Parliament to pass laws amending the provisions of the First, Fourth, Fifth and Sixth Schedules and making amendments of the Constitution consequential on the formation of new States or alteration of areas, boundaries, or names of existing States, as well as on abolition or creation of legislative councils in States Fifth Schedule contains provisions as to administration of controlled areas and scheduled tribes while Sixth Schedule contains provisions as to the administration of tribal areas. It is further expressly provided that no such law would be deemed to be an amendment of the Constitution for the purpose of Article 368. There are a number of Articles which provide that they would continue to apply till such time as a law is made in variance of them. Some of those Articles are:

> 10, 53(3), 65(3), 73(2), 97, 98(3), 106, 120(2), 135, 137, 142(1), 146(2), 148(3), 149, 171(2), 186, 187(3), 189(3), 194(3), 195, 210(2), 221(2), 225, 229(2), 239(1), 241(3), 283(1) and (2), 285(2), 287, 300(1), 313, 345 and 373.

1347. The other provisions of the Constitution can be amended by recourse to Article 368 only

1348. Article 368 finds its place in Part XX of the Constitution and is the only article in that part. The part is headed "Amendment of the Constitution". It is not disputed that Article 368 provides for the procedure of amending the Constitution. Question, however, arises as to whether Article 368 also contains the power to amend the Constitution. It may be stated in this connection that all the five Judges who gave the dissenting judgment in the of *Golaknath case*, namely, Wanchoo, Bachawat, Ramaswami, Bhargava and Mitter, JJ. expressed the view that Article 368 dealt with not only the procedure of amending the Constitution but also contained the power to amend the Constitution. The argument that the power to amend the Constitution was contained in the residuary power of Parliament in Article 248, read with Item 97 of List I was rejected. Hidayatullah, J. agreed with the view that amendment to the Constitution is not made under power derived from Article 248, read with Entry 97 of List I. According to him, the power of amendment was sui generis. As against that, the view taken by Subba Rao, C. J., Shah, Sikri, Shelat and Vaidialingam, JJ., was that

Article 368 merely prescribed the various steps in the matter of amendment of the Constitution and that power to amend the Constitution was derived from Articles 245, 246 and 248, read with Item 97 of List I. It was said that the residuary power of Parliament can certainly take in the power to amend the Constitution.

1349. Amendment of the Constitution, according to the provisions of Article 368, is initiated by the introduction of a Bill in either House of Parliament. The Bill has to be passed in each House by a majority of total membership of that House and by a majority of not less than two-thirds members of the House present and voting. After it has been so passed, the Bill is to be presented to the President for his assent. When the President gives his assent to the Bill, the Constitution, according to Article 368, shall stand amended in accordance with the terms of the Bill. There is a proviso added to Article 368, with respect to amendment of certain articles and other provisions of the Constitution, including Article 368. Those provisions can be amended only if the Bill passed by the two Houses of Parliament by necessary majority, as mentioned earlier, is ratified by the Legislatures of not less than one-half of the States by resolutions to that effect. In such a case, the Bill has to be presented to the President for his assent only after the necessary ratification by the State Legislatures. On the assent being given, the Constitution stands amended in accordance with the terms of the Bill.

1350. The words in Article 368 "the Constitution shall stand amended in accordance with terms of the Bill", in my opinion, clearly indicate that the said article provides not merely the procedure for amending the Constitution but also contains the power to amend Article 368. The fact that a separate Part was provided with the heading "Amendment of the Constitution" shows that the said part was confined not merely to the procedure for making the amendment but also contained the power to make the amendment. It is no doubt true that Article 248, read with Item 97 of List I has a wide scope, but in spite of the width of its scope, it cannot, in my opinion, include the power to amend the Constitution. The power to legislate contained in Articles 245, 246 or 248 is subject to the provisions of the Constitution. If the argument were to be accepted that the power to amend the Constitution is contained in Article 248, read with item No. 97, List I, it would be difficult to make amendment of the Constitution because the amendment would in most of the cases be inconsistent with the article proposed to be amended. The only amendments which would be permissible in such an event would be ones like those contemplated by Articles 4 and 169 which expressly provide for a law being made for the purpose in variance of specified provisions of the Constitution. Such law has to be passed by ordinary legislative process. Article 368 would thus become more or less a dead letter.

1351. Article 248, read with Entry 97, List I contemplates legislative process. If the amendment of the Constitution were such a legislative process, the provision regarding ratification by the Legislatures of not less than one-half of the States in respect of certain amendments of the Constitution would be meaningless because there is no question of ratification of a legislation made by Parliament in exercise of the power conferred by Article 248, read with Entry 97, List I. It is noteworthy that ratification is by means of resolutions by State Legislatures. The passing of resolutions can plainly be not considered to be a legislative process for making a law. The State Governors also do not come into the picture for the purpose of ratification. The State Legislatures in ratifying, it has been said, exercise a constituent function. Ratifying process, according to Orfield, is equivalent to roll call of the States. Ratification by a State of constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the States to the proposed amendment (see *The Amending of the Federal Constitution*, p. 62-63).

1352. The fact that the marginal note of Article 368 contained the words "Procedure for Amendment of the Constitution" would not detract from the above conclusion as the marginal note cannot control the scope of the article itself. As mentioned earlier, the words in the article that "the Constitution shall stand amended in accordance with the terms of the Bill" indicate that the power to amend the Constitution is also contained in Article 368. The existence of such a power which can clearly be discerned in the scheme and language of Article 368 cannot be ruled out or denied by invoking the marginal note of the article.

1353. The various subjects contained in entries in List I, List II and List III of Seventh Schedule to the Constitution were enumerated and specified at great length. Our Constitution in this respect was not written on a tabula rasa. On the contrary, the scheme of distribution of legislative lists in the Government of India Act, 1935 was to a great extent adopted in the Constitution. Referring to the said distribution of Lists and the residuary provisions in the Government of India Act, Gwyer, C. J. observed in the case *In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*, 1938.[34]

> "The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among Federal Constitutions in the length and detail of its Legislative Lists."

Our Constitution-makers made list of the legislative entries still more exhaustive and the intention obviously was that the subjects mentioned should be covered by one or other of the specific entries, so that as few subjects as possible and which did not readily strike to the Constitution-makers should be covered by the residuary Entry 97 in List I. The Constitution-makers, in my opinion, could not have failed to make an entry in the lists in the Seventh Schedule for amendment of the Constitution if they had wanted the amendment of Constitution to be dealt with as an ordinary legislative measure under Articles 245, 246 and 248 of the Constitution. The fact that they provided separate Part in the Constitution for amendment of the Constitution shows that they realised the importance of the subject of amendment of the Constitution. It is difficult to hold that despite their awareness of the importance of constitutional amendment, they left it to be dealt with under and spelt out of Entry 97, List I which merely deals with "any other matter not enumerated in List II *or* List III including any tax not mentioned in either of those Lists."

1354. The residuary entry is essential in a federal Constitution and the sole object of the residuary entry is to confer on the federal legislature or the State Legislatures, as the case may be, the power to make ordinary laws under and in accordance with the Constitution in respect of any matter, not enumerated in any other list for legislation. By the very nature of things, the power to amend the Constitution cannot be in the residuary entry in a federal constitution because the power to amend the Constitution would also include the power to alter the distribution of subjects mentioned in different entries. Such a power can obviously be not a legislative power.

---

[34] 1939 FCR 18 : AIR 1939 FC 1 : (1939) 1 MLJ Supp 1.

1355. It was originally intended that the residuary power of legislation should be vested in the States. This is clear from the Objective Resolution which was moved by Pt. Nehru in the Constitutent Assembly before the partition of the country on December 13, 1946 (see *Constituent Assembly Debates*, Vol. I, p. 59). After the partition, the residuary power of legislation was vested in the Centre and was taken out of the State List. If the intention to vest residuary powers in States had been eventually carried out, no argument could possibly have been advanced that the power to amend the Constitution was possessed by the States and not by the Union. The fact that subsequently the Constitutent Assembly vested the residuary power in the Union Parliament subject to ratification by State Legislatures in certain cases, would not go to show that the residuary clause included the power to amend the Constitution.

1356. I am therefore of the view that Article 368 prescribes not only the procedure for the amendment of the Constitution but also confers power of amending the Constitution.

1357. Irrespective of the source of power, the words in Article 368 that "the Constitution shall stand amended" indicate that the process of making amendment prescribed in Article 368 is a self-executing process. The article shows that once the procedure prescribed in that article has been complied with, the end product is the amendment of the Constitution.

1358. Question then arises as to whether there is any power under Article 368 of amendment of Part III so as to take away or abridge fundamental rights. In this respect we find that Article 368 contains provisions relating to amendment of the Constitution. No words are to be found in Article 368 as may indicate that a limitation was intended on the power of making amendment, of Part III with a view to take away or abridge fundamental rights. On the contrary, the words used in Article 368 are that if the procedure prescribed by that article is complied with, the Constitution shall stand amended. The words "the Constitution shall stand amended" plainly cover the various articles of the Constitution, and I find it difficult in the face of those clear and unambiguous words to exclude from their operation the articles relating to fundamental rights in Part III of the Constitution. It is an elemental rule of construction that while dealing with a constitution every word is to be expounded in its plain, obvious and common sense unless the context furnishes some ground to control, qualify or enlarge it and there cannot be imposed upon the words any recondite meaning or any extraordinary gloss (see Story on *Constitution of the United States*, Vol. I, para 451). It has not yet been erected into a legal maxim of constitutional construction that words were meant to conceal thoughts. If framers of the Constitution had intended that provisions relating to fundamental rights in Part III be not amended, it is inconceivable that they would not have inserted a provision to that effect in Article 368 or elsewhere. I cannot persuade myself to believe that the framers of the Constitution deliberately used words which cloaked their real intention when it would have been so simple a matter to make the intention clear beyond any possibility of doubt.

1359. In the case of *The Queen* v. *Burah*,[35] Lord Solborne observed:

> "The established courts of justice, when a question arises whether

---

[35] (1878) 2 AC 889 at p. 904-5.

> the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instruments by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited,......... it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions."

Although the above observations were made in the context of the legislative power, they have equal, if not greater, relevance in the context of the power of amendment of the Constitution.

1360. It also cannot be said that even though the framers of the Constitution intended that Part III of the Constitution relating to fundamental rights should not be amended, by inadvertent omission they failed to make an express provision for the purpose. Reference to the proceedings, dated September 17, 1949, of the Constitutent Assembly shows that an amendment to that effect was moved by Dr. P. S. Deshmukh. This amendment which related to insertion of Article 304-A after Article 304 (which corresponded to present Article 368) was in the following words:

> "Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and ultra vires of any Legislature."

The above amendment, which was subsequently withdrawn, must have been incorporated in the Constitution if the framers of the Constitution had intended that no amendment of the Constitution should take away or abridge the fundamental rights in Part III of the Constitution.

1361. Before the Constitution was framed, Mr. B. N. Rau, Constitutional Adviser, sent a questionnaire along with a covering letter on March 17, 1947 to the members of the Central and Provincial Legislatures. Question 27 was to the effect as to what provision should be made regarding the amendment of the Constitution. The attention of the members of the Central and Provincial Legislatures was invited in this context to the provisions for amendment in the British, Canadian, Australian, South African, U. S., Swiss and Irish Constitutions. Some of those Constitutions placed limitations on the power of amendment and contained express provisions in respect of those limitations. For instance, Article 5 of the United States contained a proviso "that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article and that no State, without its consent, shall be deprived of its equal suffrage in the Senate". It is inconceivable that, despite the awareness of the fact that in the Constitutions of other countries where restriction was sought to be placed on the power of amendment an express provision to that effect had been inserted, the framers of our Constitution would omit to insert such a provision in Article 368 or in some other article if, in fact, they wanted a limitation to be placed on the power of amendment in respect of articles relating to fundamental rights. On the contrary, there is clear indication that the Drafting Committee was conscious of the need of having an express provision regarding limitation on the power of amendment in case such a limitation was desired. This is clear from Article 305 of the Draft Constitution which immediately followed Article 304 corresponding to Article 368 of the Constitution as finally adopted. Article 305 of the Draft Constitution, which was subsequently dropped, was in the following terms:

> "305. Notwithstanding anything contained in Article 304 of this Constitution, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the Legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution."

Article 305 of the Draft Constitution reproduced above makes it manifest that the Drafting Committee made express provision for limitation on the power of amendment in case such a limitation was desired. The fact that in the Constitution as ultimately adopted, there was no provision either in Article 368 or in any other article containing a limitation on the power of amendment shows that no such limitation was intended.

1362. The speech of Dr. Ambedkar made on September 17, 1949 while dealing with the provision relating to Amendment of the Constitution also makes it clear that he divided the various articles of the Constitution into three categories. In one category were placed certain articles which would be open to amendment by Parliament by simple majority. To that category belonged Articles 2 and 3 of the Draft Constitution relating to the creation and reconstitution of the existing States as well as some other articles like those dealing with upper chambers of the State Legislatures. The second category of articles were those which could be amended by two-thirds majority of members present and voting in each House of Parliament. The third category dealt with articles which not only required two-thirds majority of each House of Parliament but also the ratification of not less than half of the Legislatures of the States. There was nothing in the speech of Dr. Ambedkar that apart from the three categories of articles, there was a fourth category of articles contained in Part III which was not amendable and as such, could not be the subject of amendment.

1363. It may be mentioned that according to the report of the Constituent Assembly Debates, the speech of Dr. Ambedkar delivered on September 17, 1949 contains the following sentence:

> "If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary for them is to have two-thirds majority." (Vol. IX, p. 1661).

The words "Part III" in the above sentence plainly have reference to the third category of articles mentioned in the proviso to draft Article 304 (present Article 368) which required two-thirds majority and ratification by at least half of the State Legislatures. These words do not refer to Part III of the Constitution, for if that were so the sentence reproduced above would appear incongruous in the context of the entire speech and strike a discordant note against the rest of the speech. Indeed, the entire tenor of the above speech, as also of the other speeches delivered by Dr. Ambedkar in the Constituent Assembly, was that all the articles of the Constitution were subject to the amendatory process.

1364. Another fact which is worthy of note is that the Constitution (First Amendment) Act, 1951 was passed by the Provisional Parliament which had also acted as the Constitutent Assembly for the drafting of the Constitution. By the First Amendment, certain fundamental rights contained in Article 19 were abridged and amended. Speeches in support of the First Amendment were made by Pt. Nehru and Dr. Ambedkar. It was taken for granted that the Parliament had by adhering to the procedure prescribed in Article 368 the right to amend the Constitution, including Part III relating to fundamental rights. Dr. Shyama Prasad Mukherjee who opposed the First Amendment expressly conceded that Parliament had the power to make the aforesaid amendment. If it had ever been the intention of the framers of the Constitution that the provisions relating to fundamental rights contained in Part III of the Constitution could not be amended, it is difficult to believe that Pt. Nehru and Dr. Ambedkar who played such an important role in the drafting of the Constitution would have supported the amendment of the Constitution or in any case would have failed to take note of the fact in their speeches that Part III was not intended to be amended so as to take away or abridge fundamental rights. Pt. Nehru in the course of his speech in support of the First Amendment after referring to the need of making the Constitution adaptable to changing social and economic conditions and changing ideas observed:

> "It is of the utmost importance that people should realise that this great Constitution of ours, over which we laboured for so long, is not a final and rigid thing, which must either be accepted or broken. A Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it. Otherwise, if you make them feel that it is unchangeable and cannot be touched, the only thing to be done by those who wish to change it is to try to break it. That is a dangerous thing and a bad thing. Therefore, it is a desirable and a good thing for people to realise that this very fine Constitution that we have fashioned after years of labour is good in so far as it goes but as society changes, as conditions change we amend it in the proper way. It is not like the unalterable law of the Medes and the Persians that it cannot be changed, although the world around may change."

1365. The First Amendment is contemporaneous practical exposition of the power of amendment under Article 368. Although as observed elsewhere, the provisions of Article 368 in my view are plain and umambiguous and contain no restrictions so far as amendment of Part III is concerned, even if it may be assumed that the matter is not free from doubt the First Amendment provides clear evidence of how the provisions of Article 368 were construed and what they were intended and assumed to convey by those who framed the Constitution and how they acted upon the basis of the said intention and assumption soon after the framing of the Constitution. The contemporaneous practical exposition furnishes considerable aid in resolving the said doubt and construing the provisions of the article. It would be pertinent to reproduce in this context the observations of Chief Justice Fuller while speaking for the US Supreme Court in the case of *William McPherson* v. *Robert R. Blacker*:[36]

> "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to

---

[36] 146 US 1.

> interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled."

1366. I may also reproduce in this context the following passage from pages 49-50 of Willoughby's *Constitution of the United States*, Vol. I:

> "In *Lithographic Company* v. *Sarony*,[37] the court declared: 'The construction placed upon the Constitution by the first Act of 1790 and the Act of 1802 by the men who were contemporary with its formation, many of whom were members of the Convention who framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive,"

1367. So far as the question is concerned as to whether the speeches made in the Constituent Assembly can be taken into consideration, this court has in three cases, namely, *I.C. Golak Nath & Ors.* v. *State of Punjab and Anrs.* (supra), *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & Ors.* v. *Union of India*[38] and *Union of India* v. *H.S. Dhillon*,[39] taken the view that such speeches can be taken into account. In *Golak Nath's case* (supra) Subba Rao, C.J., who spoke for the majority referred to the speeches of Pt. Jawaharlal Nehru and Dr. Ambedkar on page 791. Reference was also made to the speech of Dr. Ambedkar by Bachawat, J. in that case on page 924. In the *case of Madhav Rao*, Shah, J. who gave the leading majority judgment relied upon the speech of Sardar Patel, who was Minister for Home Affairs, in the Constituent Assembly (see Page 83). Reference was also made to the speeches in the Constituent Assembly by Mitter, J. on pages 121 and 122. More recently in *H.S. Dhillon's case* (supra) relating to the validity of amend ment in Wealth Tax Act, both the majority judgment as well as the minority judgment referred to the speeches made in the Constitutent Assembly in support of the conclusion arrived at. It can, therefore, be said that this Court has now accepted the view in its decisions since *Golak Nath's case* (supra) that speeches made in the Constituent Assembly can be referred to while dealing with the provision of the Constitution.

1368. The speeches in the Constitutent Assembly, in my opinion, can be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches made in the Constitutent Assembly does not absolve the court from performing that task. The draftsmen are supposed to have expressed their intentions in the words used by them in the provisions. Those words are final repositories of the intention and it would be ultimately from the words of the provision that the intention of the draftsmen would have to be gathered.

---

[37] 111 US 53.

[38] (1971) 3 SCR 9: (1971) 1 SCC 85.

[39] (1972) 2 SCR 33: (1971) 2 SCC 779.

1369. The next question which arises for consideration is whether the word "law" in Article 13(2) includes amendment of the Constitution. According to Article 13(2), the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. "State" has been defined in Article 12 to include, unless the context otherwise requires, the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The stand taken on behalf of the petitioners is that amendment of the Constitution constitutes "law" for the purpose of Article 13(2). As such, no amendment of the Constitution can take away or abridge the fundamental rights conferred by Part III of the Constitution. Reference has also been made to clause (1) of Article 13, according to which all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. It is urged that word "law" in Article 13(2) should have the same meaning as that word in Article 13(1) and if law in Article 13(1) includes constitutional law, the same should be its meaning for the purpose of Article 13(2). Our attention has also been invited to Article 372(1) of the Constitution which provides that notwithstanding the repeal by this Constitution of the enactment referred to in Article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. According to Explanation I to Article 372, the expression "law in force" shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed notwithstanding that it or parts of it may not be then in operation either at all or in particular areas. The same is the definition of "law in force" in Article 13(3).

1370. I find it difficult to accept the contention that an amendment of Constitution made in accordance with Article 368, constitutes law for the purpose of Article 13(2). The word "law" although referred to in a large number of other articles of the Constitution finds no mention in Article 368. According to that article, the Constitution shall stand amended in accordance with the terms of the Bill after it has been passed in compliance with the provisions of that article. Article 368 thus contains an indication that what follows as a result of the compliance with Article 368 is an amendment of the Constitution and not law in the sense of being ordinary Legislation. In a generic sense, "Law" would include constitutional laws, including amendment of the Constitution, but that does not seem to be the connotation of the word "Law" as used in Article 13(2) of the Constitution. There is a clear distinction between statutory law made in exercise of the legislative power and constitutional law which is made in exercise of the constitutent power and the distinction should not be lost sight of. A Constitution is the fundamental and basic law and provides the authority under which ordinary law is made. The Constitution of West Germany, it may be stated, is called the basic law of the Federal Republic of Germany. A Constitution derives its authority generally from the people acting in their sovereign capacity and speaking through their representatives in a Constituent Assembly or Convention. It relates to the structure of the government, the extent and distribution of its powers and the modes and principles of its operation, preceding ordinary laws in the point of time and embracing the settled policy of the nation. A statute on the other land is law made by the representatives of the people acting in their legislative capacity, subject to the superior authority, which is the Constitution. Statutes are enactments or rules for the government of civil conduct or for the adminstration or for the defence of the government. They relate to law and order, criminal offences, civil disputes, fiscal matters and other subjects on which it may become necessary to have law. Statutes are quite often tentative, occasional, and in the nature of temporary expedients (see *Constitutional Law and Its Administration*, by S.P. Weaver, p. 3). Article 13(2) has reference to ordinary piece of legislation. It would also, in view of the definition given in clause (*a*) of Article 13(3) include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The Constitution has thus made it clear in matters in which there could be some doubt as to what would constitute "Law". If it had been the intention of the framers of the Constitution that the "Law" in Article 13 would also include constitutional law including laws relating to the amendment of Constitution, it is not explained as to why they did not expressly so state is clause (*a*) of Article 13(3). The Constitution itself contains indications of the distinction between the Constitution and the Laws framed under the Constitution. Article 60 provides for the oath or affirmation to be made and subscribed by the President before entering upon office. The language in which that oath and affirmation have been couched, though not crucial, has some bearing. The form of the oath or affirmation is as under:

> "I, A. B. do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

The facts that both the words "the Constitution and the law" have been used in the above form tends to show that for the purpose of the Constitution the law and the Constitution are not the same.

1371. It may be mentioned that Articles 56(1)(*b*) and 61(1) which deal with impeachment of the President refer only to "violation of the Constitution". There is no reference in those articles to violation of law. Article 69 which prescribes the oath for the Vice-President refers to "allegiance to the Constitution as by law established". The words "as by law established" indicates the legal origin of the Constitution. Article 143, to which our attention has been invited, gives power to the President to refer to the Supreme Court a question of law or fact of such importance that it is expedient to obtain the opinion of this Court. It is pointed out that question of law in that article would include a question relating to constitutional law. This no doubt is so but this is due to the fact that words "questions of law or fact" constitute a well known phrase in legal terminology and have acquired a particular significance. From the use of those words in Article 143 it cannot be inferred that the framers of the Constitution did not make a distinction between the Constitution and the law.

1372. Articles 245, 246 and 248 deal with the making of laws. The words "shall not make any law" in Article 13(2) seem to echo the words used in Articles 245, 246 and 248 of the Constitution which deal with the making of laws. The words "make any law" in Article 13 as well as the above three articles should carry, in my opinion, the same meaning, namely, law made in exercise of legislative power. In addition to that, the law in Article 13 in view of the definition in Article 13(3) shall also include special provisions mentioned in clause (3).

1373. It has already been mentioned above that there is no question in the case of a law made by the Parliament of its ratification by the resolutions passed by the State Legislatures. The fact that in case of some of the amendments made under Article 368 such ratification is necessary shows that an amendment of the Constitution is not law as contemplated by Article 13(2) or Articles 245, 246 and 248.

1374. Article 395 of the Constitution repealed the Indian Independence Act, 1947 and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949. The law in force mentioned in Article 372(1) has reference not to any constitutional law in the sense of being a law relating to the Constitution of either the territory of erstwhile British India or the territory comprised in the Indian States. So far as the territory of British India was concerned, the law before January 26, 1950 relating to the constitution was contained in the Government of India Act, 1935 and the Indian Independence Act, 1947. Both these Acts were repealed by Article 395 when the Constitution of India came into force. As regards the territory comprised in Indian States, the law relating to their Constitutions in so far as it was inconsistent with the provisions of the Constitution of India also came to an end before January 26, 1950 when the said Constitution came into force. The only constitution which was in force since that date was the Constitution of India and it applied to the whole of India, including the erstwhile Indian States and the British India. The various notifications which were issued before January 26, 1950 mentioned that with effect from that date "the Constitution of India, shortly to be adopted by the Constitutent Assembly of India shall be the Constitution for the States as for other parts of India and shall be enforced as such" (see *White Paper on Indian States*, pages 365 to 371). It would thus appear that hardly any law containing the constitutions of territory of erstwhile Indian States remained in force after the coming into force of the Constitution of India with all its exhaustive provisions. If the law in force contemplated by Article 372(1) must be such as was continued after January 26, 1950, it would follow that Article 372 does not relate to the constitutional law in the sense of being law relating to the constitution of a territory.

1375. Although the law in force referred to in Article 372(1) would not include law relating to the Constitutions of the territory of erstwhile British India or the Indian States, it did include law relating to subjects dealt with by the Constitutions in force in those territories. Such a law which partakes of the nature of either a statutory law or an Order made under the organic provisions of those constitutions, continued in force under Article 372 (1). A statutory law or Order is obviously of an inferior character and cannot have the same status as that of a constitution. Article 372(1) in the very nature of things deals with laws made under the provisions of Constitutions which were in force either in the erstwhile British India or the territory comprised in Indian States. The opening words of Article 372(1) "notwithstanding the repeal by this Constitution of the enactments referred to in

Article 395" indicate that the laws in force contemplated by Article 372 are those laws which were framed under the repealed Indian Independence Act, 1947 and the Government of India Act, 1935 or similar other legislative enactments or Orders made under the provisions of constitutions of erstwhile Indian States. Such legislative enactments or Orders were inferior in status to a Constitution. I am, therefore, of the view that the word "law" in Article 372 has reference to law made under a Constitution and not to the provisions of a Constitution itself.

1376. Article 372(1) is similar to the provisions of Section 292 of the Government of India Act, 1935. As observed by Gwyer, C. J., in the case of *The United Provinces* v. *Mst. Atica Begum and Others.*,[40] such a provision is usually inserted by draftsmen to negative the possibility of any existing law being held to be no longer in force by reason of the repeal of the law which authorized its enactment. The question with which we are concerned is whether law in Article 13 or Article 372 could relate to the provisions of the Constitution or provisions relating to its amendment. So far as that question is concerned, I am of the opinion that the language of Articles 372 and 13 shows that the word "law" used therein did not relate to such provisions. The Constitution of India was plainly not a law in force at the time when the Constitution came into force. An amendment of the Constitution in the very nature of things can be made only after the Constitution comes into force. As such, a law providing for amendment of the Constitution cannot constitute law in force for the purpose of Article 13(1) or Article 372(1).

1377. The language of Article 13(2) shows that it was not intended to cover amendments of the Constitution made in accordance with Article 368. It is difficult to accede to the contention that even though the framers of the Constitution put no express limitations in Article 368 on the power to make amendment, they curtailed that power by implication under Article 13(2). In order to find the true scope of Article 13(2) in the context of its possible impact on the power of amendment, we should read it not in isolation but along with Article 368. The rule of construction, to use the words of Lord Wright M. R. in *James* v. *Commonwealth of Australia*,[41] is to read the actual words used "not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". A combined reading of Article 13(2) and Article 368, in my view, clearly points to the conclusion that extinguishment or abridgement of fundamental rights contained in Part III of the Constitution is not beyond the amendatory power conferred by Article 368. The alleged conflict between Article 13(2) and Article 368 is apparent and not real because the two provisions operate in different fields and deal with different objects.

1378. The Constitution itself treats the subject of ordinary legislation as something distinct and different from that of amendment of the Constitution. Articles 245 to 248, read with Seventh Schedule deal with ordinary legislation, while amendment of Constitution is the subject-matter of Article 368 in a separate Part. Article 368 is independent and self-contained. Article 368 does not contain the words "subject to the provisions of this Constitution" as are to be found at the beginning of Article 245. The absence of those words in Article 368 thus shows that an amendment of the Constitution made under that article has a status higher than that of legislative law and the two are of unequal dignity. If there is any limitation on power of amendment, it must be found in Article 368 itself which is the sole fountain head of power to amend, and not in other provisions dealing with ordinary legislation. As stated on pages 24-26 in the *Amending of Federal Constitution* by Orfield 'limitation on the scope of amendment should be found written in the amending clause and the other articles of the Constitution should not be viewed as limitations'. The very fact that the power of amendment is put in a separate Part (Part XX) and has not been put in the Part and Chapter (Part XI, Chapter I) dealing with legislative powers shows that the two powers are different in character and operate in separate fields. There is also a vital difference in the Procedure for passing ordinary legislation and that for bringing about a constitutional amendment under Article 368. The fact that an amendment Bill is passed by each House of Parliament and those two Houses also pass ordinary legislation does not obliterate the difference between the constituent power and the legislative power nor does it warrant the conclusion that constituent power is a species of legislative power.

---

[40] 1940 FCR 110: AIR 1941 FC 16: (1941) 1 MLJ Supp 65.

[41] 1936 AC 578.

1379. Our attention has been invited on behalf of the petitioners to the proceedings of the Constituent Assembly on April 29, 1947. Sardar Patel on that day made a move in the Constituent Assembly that clause (2) be accepted. Clause (2) which provided the basis for clauses (1) and (2) of Article 13 as finally adopted was in the following words:

> "All existing laws, notification, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right."

Mr. K. Santhanam then moved an amendment for substituting the concluding words of clause (2) by the following words:

> "Nor shall any such right be taken away or abridged except by an amendment of the constitution."

The above amendment was accepted by Sardar Patel. Motion was thereafter adopted accepting the amended clause which was in the following words:

> "All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall any such right be taken away or abridged except by an amendment of the Constitution."

1380. In October 1947 the Constitutional Adviser prepared the Draft Constitution, sub-clause (2) of Clause 9 of which was as under:

> "(2) Nothing in this Constitution shall be taken to empower the State to make any law which curtails or takes away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under Section 232 and any law made in contravention of this sub-section shall, to the extent of the contravention, be void."

Minutes of the Drafting Committee of October 13, 1947 show that it was decided to revise Clause 9. Revised Clause 9 was put in the appendix as follows:

> "9. (1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with any of the provisions of this Part, shall, to the extent of such inconsistency, be void.

> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this sub-section shall, to the extent of the contravention' be void.
>
> (3) In this section, the expression 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any Part thoreof."

On February 21, 1948, Dr. Ambedkar forwarded the Draft Constitution of India to the President of the Constituent Assembly along with a covering letter. Clause 9 in this Draft Constitution was numbered as Clause 8. Sub-clause (2) of Clause 9 was retained as sub-clause (2) of Clause 8. A proviso was also added to that sub-clause, but that is not material for the purpose of the present discussion. The Constitution was thereafter finally adopted and it contained Article 13, the provisions of which have been reproduced earlier.

1381. It has been argued on behalf of the petitioners that the members of the Drafting Committee who were eminent lawyers of India, deliberately revised Clause 9 of the Draft Constitution prepared by the Constitutional Adviser with a view to undo the effect of the amendment moved by Mr. Santhanam which had been accepted by the Constituent Assembly, because the members of the Drafting Committee wanted that the fundamental rights should not be abridged or taken away by the amendment of the Constitution.

1382. I find it difficult to accept the above argument. It is inconceivable that the members of the Drafting Committee would reverse the decision which had been taken by the Constituent Assembly when it accepted the amendment moved by Mr. Santhanam and adopted the motion for the passing of clause containing that amendment. It would appear from the speech of Mr. Santhanam that he had moved the amendment in order to remove doubt. Although there is nothing in the minutes to show as to why the members of the Drafting Committee did not specifically incorporate Mr. Santhanam's Amendment in the revised clause, it seems that they did so because they took the view that it was unnecessary. In his letter, dated February 21, 1948, Dr. Ambedkar, Chairman of the Drafting Committee wrote to the President of the Constituent Assembly:

> "In preparing the Draft the Drafting Committee was of course expected to follow the decisions taken by the Constituent Assembly or by the various Committees appointed by the Constituent Assembly. This the Drafting Committee has endeavoured to do as far as possible. There were however some matters in respect of which the Drafting Committee felt it necessary to suggest certain changes. All such changes have been indicated in the draft by underlining or side lining the relevant portions. Care has also been taken by the Drafting Committee to insert a footnote explaining the reasons for every such change."

It is, therefore, plain that if it had been decided to make a material change in the draft article with a view to depart from the decision of the Constituent Assembly, the change would have been indicated by underlining or sidelining the relevant provision and also by inserting a footnote explaining reasons for the change. In the absence of any underlining, sidelining or footnote, it can be presumed that members of the Drafting Committee did not intend to make a change. A very material fact which should not be lost sight of in this context is the note which was put in October 1948 under the draft Article 8. It was stated in the Note:

> "Clause (2) of Article 8 does not override the provisions of Article 304 of the Constitution. The expression 'law' used in the said clause is intended to mean 'ordinary legislation'. However, to remove any possible doubt, the following amendment may be made in Article 8:
>
> In the proviso to clause (2) of Article 8, after the words 'nothing in this clause shall' the words 'affect the provisions of Article 304 of this Constitution or' be inserted." (See Shiva Rao's "*The Framing of India's Constitution*" Vol. IV page 26)

The above note and other such notes were made by the Constitutional Adviser and reproduced fully the views of the Drafting Committee and/or of the Special Committee (See Shiva Rao's "*The Framing of India's Constitution*", Vol. I page 4). It would thus appear that there is no indication that the members of the Drafting Committee wanted to deviate from the decision of the Constituent Assembly by making the provisions relating to fundamental rights unamendable. On the contrary, the note shows that they accepted the view embodied in the decision of the Constituent Assembly.

1383. Apart from that, I am of the view that if the preservation of the fundamental rights was too vital and important a desideratum, it would seem logical that a proviso would have been added in Article 368 expressly guaranteeing the continued existence of fundamental rights in an unabridged form. This was, however, not done.

1383-A. The next question which should engage our attention is about the necessity of amending the Constitution and the reasons which weighed with the framers of the Constitution for making provision for amendment of the Constitution. A Constitution provides the broad outlines of the administration of a country and concerns itself with the problems of the Government. This is so whether the Government originates in a forcible seizure of power or comes into being as the result of a legal transfer of power. At the time of the framing of the Constitution many views including those emanating from conflicting extremes are presented. In most cases the Constitution is the result of a compromise between conflicting views. Those who frame a Constitution cannot be oblivious of the fact that in the working of a Constitution many difficulties would have to be encountered and that it is beyond the wisdom of one generation to hit upon a permanently workable solution for all problems which may be faced by the State in its onward march towards further progress. Sometimes a judicial interpretation may make a Constitution broad-based and put life into the dry bones of a Constitution so as to make it a vehicle of a nation's progress. Occasions may also arise where judical interpretation might rob some provision of a Constitution of a part of its efficacy as was contemplated by the framers of the Constitution. If no provision were made for the amendment of the Constitution, the people would be left with no remedy or means for adapting it to the changing need of times and would per force have recourse to extra-constitutional methods of changing the Constitution. The extra-constitutional methods may sometimes be bloodless but more often they extract a heavy toll of the lives of the citizens and leave a trail of smouldering bitterness. A State without the means of some change, as was said by Burke in his Reflections on Revolution, is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. According to Dicey, twelve unchangeable Constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Phillipe's monarchy was destroyed within seven years of the time when Tooqueville pointed out that no power existed legally capable of altering the articles of the Charter. On one notorious instance at least—and other examples of the same phenomenon might be produced from the annals of revolutionary France—the immutability of the Constitution was the ground or excuse for its violent subversion. To quote the words of Dicey:

> "Nor ought the perils in which France was involved by the immutability with which the statesmen of 1848 invested the Constitution to be looked upon as exceptional; they arose from a defect which is inherent in every rigid constitution. The endeavour to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power; it therefore tends to bring the letter of the law into conflict with the will of the really supreme power in the State. The majority of the French electors were under the Constitution the true sovereign of France; but the rule which prevented the legal re-election of the President in effect brought the law of the land into coflict with the will of the majority of the electors, and produced, therefore, as rigid Constitution has a natural tendency to produce, an opposition between the letter of the law and the wishes of the sovereign. If the inflexibility of French Constitutions has provoked revolution, the flexibility of English Constitutions has, once at least, saved them for violent overthrow."

The above observations were amplified by Dicey in the following words:

> "To a student, who at this distance of time calmly studies the history of the first Reform Bill, it is apparent, that in 1832 the supreme legislative authority of Parliament enabled the nation to carry through a political revolution under the guise of a legal reform.
>
> The rigidity, in short, of a Constitution tends to check gradual innovation; but, just because it impedes change, may, under unfavourable circumstances occasion or provoke revolution."

According to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself (see *The Theory and Practice of Modern Government*, p. 156-157). The amending clause, it has been said, is the most important part of a Constitution. Upon its existence and truthfulness, i. e. its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution. A Constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organised in the Constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state (see *Political Science and Comparative Constitutional Law*, Vol. I by Burgess, p. 137). Burgess further expressed himself in the following words:

> "It is equally true that development is as much a law of state life as existence. Prohibit the former, and the latter is the existence of the body after the spirit has departed. When, in a democratic political society, the well-matured, long and deliberately formed will of the undoubted majority can be persistently and successfuly thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the state from revolution and violence as there is from the

> caprice of the majority, where the sovereignty of the bare majority is acknowledged. The safeguards against too radical change must not be exaggerated to the point of dethroning the real sovereign." (*Ibid*, p. 152).

Justifying the amendment of the Constitution to meet the present conditions, relations and requirements, Burgess said we must not, as Mirabeau finely expressed it, lose the grande morale in the petite morale.

1384. According to John Stuart Mill, no Constitution can expect to be permanent unless it guarantees progress as well as order. Human societies grow and develop with the lapse of time, and unless provision is made for such Constitutional readjustments as their internal development requires, they must stagnate or retrogress (see *Political Science and Government* by J. W. Garner, pp. 536-537).

1385. Willis in his book on the Constitutional Law of the United States has dealt with the question of amendment of the Constitution in the following words:

> "Why should change and growth in constitutional law stop with the present? We have always had change and growth. We have needed change and growth in the past because there have been changes and growth in our economic and social life. There will probably continue to be changes in our economic and social life and there should be changes in our Constitutional law in the future to meet such changes just as much as there was need of change in the past. The Fathers in the Constitutional Convention expected changes in the future: otherwise they would not have provided for amendment. They wanted permanency of our Constitution and there was no other way to obtain it. The people of 1789 had no more sovereign authority than do the people of the present."

Pleading for provision for amendment of a Constitution and at the same time uttering a note of caution against a too easy method of amendment, Willis wrote:

> "If no provision for amendment were provided, there would be a constant danger of revolution. If the method of amendment were made too easy, there would be the danger of too hasty action all of the time. In either case there would be a danger of the overthrow of our political institutions. Hence the purpose of providing for amendment of the Constitution is to make it possible gradually to change the Constitution in an orderly fashion as the changes in social conditions make it necessary to change the fundamental law to correspond with such social change."

1386. We may also recall in this connection the words of Harold Laski in his tribute to Justice Holmes and the latter's approach to the provisions of the U. S. Constitution. Said Laski:

> "The American Constitution was not made to compel the twentieth-century American to move in the swaddling-clothes of his ancestors' ideas. The American Constitution must/ be moulded by reason to fit new needs and new necessities............The law must recognise change and growth even where the lawyer dislikes their implications. He may be skeptical of their implications; he has not the right to substitute his own pattern of Utopia for what they seek to accomplish."

1387. According to Ivor Jennings, flexibility is regarded as a merit and rigidity a defect because it is impossible for the framers of a Constitution to foresee the conditions in which it would apply and the problems which will arise. They have not the gift of prophecy. A Constitution has to work not only in the environments it was drafted, but also centuries later (see *Some Characteristics of Indian Constitution*, p. 14-15). It has consequently been observed by Jennings:

> "The real difficulty is that the problems of life and society are infinitely variable. A draftsman thinks of the problems that he can foresee, but he sees through a glass, darkly. He cannot know what problems will arise in ten, twenty, fifty or a hundred years.
>
> "Any restriction on legislative power may do harm, because the effect of that restriction in new conditions cannot be foreseen."

1388. The machinery of amendment, it has been said, should be like a safety valve, so devised as neither to operate the machine with too great facility not to require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand to those of conservatism. The letter of the Constitution must neither be idolized as a sacred instrument with that mistaken conservatism which clings to its own worn-out garments until the body is ready to perish from cold, nor yet ought it to be made a plaything or politicians, to be tampered with and degraded to the level of an ordinary statute (see *Political Science and Government* by J.W. Garner, p. 538).

1389. The framers of our Constitution were conscious of the desirability of reconciling the urge for change with the need of continuity. They were not oblivious of the phenomenon writ large in human history that change without continuity can be anarchy; change with continuity can mean progress; and continuity without change can mean no progress. The Constitution-makers have, therefore kept the balance between the danger of having a non-amendable constitution and a constitution which is too easily amendable. It has accordingly been provided that except for some not very vital amendments which can be brought about by simple majority, other amendments can be secured only if they are passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of each House present and voting. Provision is further made that in respect of certain matters which affect the interest of the States the amendment must also be ratified by the Legislatures of not less than one-half of the States by resolution to that effect. It can, therefore, be said that while a provision has been made for amendment of the Constitution, the procedure for the bringing about of amendment is not so easy as may make it a plaything of politicians to be tampered with and degraded to the level of ordinary statute. The fact that during the first two decades after the coming into force of Constitution the amending Bills have been passed without much difficulty with requisite majority is a sheer accident of history and is due to the fact that one party has happened to be in absolute majority at the Centre and many of the States. This circumstance cannot obliterate the fact that in normal circumstances when there are well balanced parties in power and in opposition the method of amending the Constitution is not so easy.

1390. Another circumstance which must not be lost sight of is that no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the machinery of government and the laws according to their requirements. Although guidelines for the organization and functioning of the future government may be laid down and although norms may also be prescribed for the legislative activity, neither the guidelines should be so rigid nor the norms so inflexible and unalterable as should render them to be incapable of change, alteration and replacement even though the future generations want to change, alter or replace them. The guidelines and norms would in such an event be looked upon as fetters and shackles upon the free exercise of the sovereign will of the people in times to come and would be done away with by methods other than constitutional. It would be nothing short of a presumptous and vain act and a myopic obsession with its own wisdom for one generation to distrust the wisdom and good sense of the future generations and to treat them in a way as if the generations to come would not be sui juris. The grant of power of amendment is based upon the assumption that as in other human affairs, so in constitutions, there are no absolutes and that the human mind can never reconcile itself to fetters in its quest for a better order of things. Any fetter resulting from the concept of absolute and ultimate inevitably gives birth to the urge to revolt. Santayana once said: "Why is there sometimes a right to revolution ? Why is there sometimes a duty to loyalty ? Because the whole transcendal philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostasized, because the will is absolute neither in the individual nor in the humanity.........." (see *German Philosophy and Politics*, (1915) 645-649 quoted by Frankfurter, J. in "*Mr. Justice Holmes*" 1931, Ed., page 117). What is true of transcendental philosophy is equally true in the mundane sphere of a constitutional provision. An unamendable constitution, according to Mulford, is the worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres. (see *Political Science and Government* by J. W. Garner, pages 537, 538).

1391. According to Woodrow Wilson, political liberty is the right of those who are governed to adjust government to their own needs and interest. Woodrow Wilson in this context quoted Burke who had said that every generation sets before itself some favourite object which it pursues as the very substance of liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only its conception can be, the large image of what it is. Liberty fixed in unalterable law would be no liberty at all. Government is a part of life, and, with life, it must change, alike in its objects and in its practices; only this principle must remain unaltered, —this principle of liberty, that there must be the freest right and opportunity of adjustment. Political liberty consists in the best practicable adjustment between the power of the government and the privilege of the individual; and the freedom to alter the adjustment is as important as the adjustment itself for the ease and progress of affairs and the contentment of the citizen (see *Constitutional Government in the United States* by Woodrow Wilson, p. 4-6).

1392. Each generation, according to Jefferson, should be considered as a distinct nation, with a right by the will of the majority to bind themselves but none to bind the succeeding generations, more than the inhabitant of another country. The earth belongs in usufruct to the living, the dead have neither the power nor the right over it. Jefferson even pleaded for revision or opportunity for revision of constitution every nineteen years. Said the great American statesman:

> "The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitiously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine and suppose that preceding generations held the earth more freely than we do, had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine that the earth belongs to the dead and not the living."

The above words were quoted during the course of the debate in the Constituent Assembly (see *Constituent Assembly Debates*, Vol. XI p. 975).

1393. Thomas Paine gave expression to the same view in the following words:

> "There never did, there never will, and there never can, exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the 'end of time', or of commanding for ever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow."

We may also reproduce the words of Pt. Nehru in his speech to the Constituent Assembly on November 11, 1948:

> "And remember this, that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a Nation's growth, the growth of living vital organic people. Therefore it has to be flexible."

1394. If it is not permissible under Article 368 to so amend the Constitution as to take away or abridge the fundamental rights in Part III, as has been argued on behalf of the petitioners, the conclusion would follow that the only way to take away or abridge fundamental rights, even if the overwhelming majority of people, e. g. 90 per cent of them want such an amendment, is by resort to extra-constitutional methods like revolution. Although, in my opinion, the language of Article 368 is clear and contains no limitation on the power to make amendment to so as take away or abridge fundamental rights, even if two interpretations were possible, one according to which the abridgement or extinguishment of fundamental rights is permissible in accordance with the procedure prescribed by Article 368 and other according to which the only way of bringing about such a result is an extra-constitutional method like revolution, the court, in my opinion, should lean in favour of the first interpretation. It hardly needs much argument to show that between peaceful amendment through means provided by the constitution and the extra-constitutional method with all its dangerous potentialities the former method is to be preferred. The contrast between the two methods is so glaring that there can hardly be any difficulty in making our choice between the two alternatives.

1395. The aforesaid discussion would also reveal that the consequences which would follow from the acceptance of the view that there is no power under Article 368 to abridge or take away fundamental rights would be chaotic because of the resort to extra-constitutional methods. As against that the acceptance of the opposite view would not result in such consequences. Judged even in this light, I find it difficult to accede to the contention advanced on behalf of the petitioner.

1396. I may at this stage deal with the question, adverted to by the learned counsel for the petitioners, as to how far the consequences have to be taken into account in construing the provisions of the Constitution. In this connection, I may observe that it is one of the well-settled rules of construction that if the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. It is equally well-settled that where alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (see *Collector of Customs, Baroda* v. *Digvijaysinhji Spinning & Weaving Mills Ltd*).[42] These principles of construction apply with greater force when we are dealing with the provisions of a constitution.

1397. I have kept the above principles in view and am of the opinion that as the language of Article 368 is plain and unambiguous, it is not possible to read therein a limitation on the power of Parliament to amend the provisions of Part III of the Constitution so as to abridge or take away fundamental rights. Apart from that, I am of the view that if two constructions were possible, the construction which I have accepted would, as mentioned above, avoid chaotic consequences and would also prevent the introduction of uncertainty, friction or confusion into the working of our Constitution.

1398. It is also, in my opinion, not permissible in the face of the plain language of Article 368 to ascertain by any process akin to speculation the supposed intention of the Constitution-makers. We must act on the principle that if the words are plain and free from any ambiguity the Constitution-makers should be taken to have incorporated their intention in those word.

1399. It seems inconceivable that the framers of the Constitution in spite of the precedents of the earlier French Constitutions which perished in violence because of their non-amendability, inserted in the Constitution a Part dealing with fundamental rights which even by the unanimous vote of the people could not be abridged or taken away and which left with people no choice except extra-constitutional methods to achieve that object. The mechanics of the amendment of the Constitution, including those relating to extinguishment or abridgement of fundamental rights, in my opinion, are contained in the Constitution itself and it is not necessary to have recourse to a revolution or other extra-constitutional methods to achieve that object.

---

[42] (1962) 1 SCR 896 on p. 899: AIR 1961 SC 1549: (1963) 1 SCJ 278.

1400. Confronted with the situation that if the stand of the petitioners was to be accepted about the inability of the Parliament to amend Part III of the Constitution except by means of a revolution or other extra-constitutional methods, the learned counsel for the petitioners has argued that such an amendment is possible by making a law for convening a Constituent Assembly or for holding a referendum. It is urged that there would be an element of participation of the people in the convening of such a Constituent Assembly or the holding of a referendum and it is through such means that Part III of the Constitution can be amended so as to take away or abridge fundamental rights. The above argument, in my opinion, is untenable and fallacious. If Parliament by a two-thirds majority in each House and by following the procedure laid down in Article 368 cannot amend Part III of the Constitution so as to take away or abridge fundamental rights, it is not understood as to how the same Parliament can by law create a body which can make the requisite amendment. If it is not within the power of Parliament to take away or abridge fundamental rights even by a vote of two-thirds majority in each House, would it be permissible for the same Parliament to enact legislation under Entry 97, List I of Seventh Schedule by simple majority for creating a Constituent Assembly in order to take away or abridge fundamental rights? Would not such a Constituent Assembly be a creature of statute made by the Parliament even though such a body has the high-sounding name of Constituent Assembly? The nomenclature of the said Assembly cannot conceal its real nature as being one created under a statute made by the Parliament. A body created by the Parliament cannot have powers greater than those vested in the Parliament. It is not possible to accept the contention that what the Parliament itself could not legally do, it could get done through a body created by it. If something is impermissible, it would continue to be so even though two steps are taken instead of one for bringing about the result which is not permitted. Apart from the above if we were to hold that the Parliament was entitled under Entry 97, List I to make a law for convening a Constituent Assembly for taking away or abridging fundamental rights, some startling results are bound to follow. A law made under Entry 97, List I would need a simple majority in each House of the Parliament for being brought on statute book, while an amendment of the Constitution would require a two-third majority of the members of each House present and voting. It would certainly be anamolous that what Parliament could not do by two-thirds majority, it can bring about by simple majority. This apart, there are many articles of the Constitution, for the amendment of which ratification by not less than half of the State Legislatures is required. The provision regarding ratification in such an event would be set at naught. There would be also nothing to prevent Parliament while making a law for convening a Constituent Assembly to exclude effective representation or voice of State Legislatures in the covening of Constituent Assembly.

1401. The argument that provision should be made for referendum is equally facile. Our Constitution-makers rejected the method of referendum. In a country where there are religious and linguistic minorities, it was not considered a proper method of deciding vital issues. The leaders of the minority communities entertained apprehension regarding this method. It is obvious that when passions are roused, the opinion of the minority in a popular referendum is bound to get submerged and lose effectiveness.

1402. It also cannot be said that the method of bringing about amendment through referendum is a more difficult method. It is true that in Australia over 30 amendments were submitted to referendum, out of which only four were adopted and two of them were of trivial nature. As against that we find that the method of referendum for amending the Constitution has hardly provided much difficulty in Switzerland. Out of 64 amendments proposed for amending the federal constitution, 49 were adopted in a popular referendum. So far as the method of amendment of the Constitution by two-third majority in either House of the Central Legislature and the ratification by the State Legislatures is concerned, we find that during first 140 years since the adoption of the United States Constitution, 3,113 proposals of amendment were made and out of them, only 24 so appealed to the Congress as to secure the approval of the Congress and only 19 made sufficient appeal to the State Legislatures to secure ratification (See *Constitutional Law of United States* by Willis p. 128). It, therefore, cannot be said that the method of referendum provides a more effective check on the power of amendment compared to the method of bringing it about by prescribed majority in each House of the Parliament.

1403. Apart from that I am of the view that it is not permissible to resort to the method of referendum unless there be a constitutional provision for such a course in the amendment provision. In the case of *George S. Hawkes* v. *Harvey C. Smith as Secretary of State of Ohio*[43] the U. S. Supreme Court was referred in the context of ratification by the States of the Eighteenth Amendment to the Constitution of the Ohio State which contained provision for referendum. It was urged that in the case of such a State ratification should be by the method of referendum. Repelling this contention the court held :

> "Referendum provisions of State Constitutions and statutes cannot be applied in the ratification or objection of amendments to the Federal Constitution without violating the requirement of Article 5 of such Constitution, that such ratification shall be by the legislatures of the several States, or by conventions therein, as Congress shall decide."

The same view was reiterated by the U.S. Supreme Court in *State of Rhode Island* v. *A. Mitchell Palmer Secretary of State* and other connected cases better known as *National Prohibition Cases.*[44]

1404. Argument has been advanced on behalf of the petitioner that there is greater width of power for an amendment of the Constitution if the amendment is brought about by a referendum compared to the power of amendment vested in the two Houses of Parliament or Federal Legislature even though it is required to be passed by a prescribed majority and has to be ratified by the State Legislatures. In this respect we find that different constitutions have devised different methods of bringing about amendment. The main methods of modern constitutional amendment are—

(1) by the ordinary legislature, but under certain restrictions;
(2) by the people through a referendum;
(3) by a majority of all the units of a federal state;
(4) by a special convention.

In some cases the system of amendment is a combination of two or more of these methods.

---

[43] 64 Lawyers Ed. 871.
[44] 253 SCR 350: 64 Lawyers Ed. 946.

1405. There are three ways in which the legislature may be allowed to amend the Constitution, apart from the case where it may do so in the ordinary course of legislation. The simplest restriction is that which requires a fixed quorum of members for the consideration of proposed amendments and a special majority for their passage. The latter condition operated in the now defunct Constitution of Rumania. According to Article 146 of the Constitution of USSR the Constitution may be amended only by a decision of the Supreme Soviet of USSR adopted by a majority of not less than two-thirds of the votes in each of its chambers. A second sort of restriction is that which requires a dissolution and a general election on the particular issue, so that new legislature, being returned with a mandate for the proposal, is in essence, a constituent assembly so far as that proposal is concerned. This additional check is applied in Belgium, Holland, Denmark and Norway (in all of which, however, also a two-thirds Parliamentary majority is required to carry the amendment after the election) and in Sweden. A third method of constitutional change by the legislature is that which requires a majority of the two Houses in joint session, that is to say, sitting together as one House, as is the case, for example, in South Africa.

1406. The second method is that which demands a popular vote or referendum or plebiscite. This device was employed in French during the Revolution and again by Louis Napoleon, and in Germany by Hitler. This system prevails in Switzerland, Australia, Eire, Italy, France (with certain Presidential provisos in the Fifth Republic) and in Denmark.

1407. The third method is peculiar to federations. The voting on the proposed measure may be either popular or by the legislatures of the states concerned. In Switzerland and Australia the referendum is in use; in the United States any proposed amendment requires ratification by the legislatures, or special conventions of three-fourth of the several states.

1408. The last method is one in which a special body is created ad hoc for the purpose of constitutional revision. In some of the states of the United States, for example, this method is in use in connection with the Constitution of the states concerned. Such a method is also allowed if the Federal Congress proposes this method for amendment of the United States Constitution. This method is prevalent in some of the states in Latin America also (see *Modern Political Constitutions* by C.F. Strong, pp. 153-154).

1409. The decision as to which method of amending the Constitution should be chosen has necessarily to be that of the Constituent Assembly. This decision is arrived at after taking into account the national requirements, the historical background, conditions prevailing in the country and other factors or circumstances of special significance for the nation. Once a method of amendment has been adopted in a Constitution, that method has to be adhered to for bringing about the amendment. The selection of the method of amendment having been made by the Constituent Assembly it is not for the court to express preference for another method of amendment. Amendment brought about by one method prescribed by the Constitution is as effective as it would have been if the Constitution had prescribed another method of bringing about amendment unless there be something in the Constitution itself which restricts the power of amendment. Article 138 of the Italian Constitution makes provision for referendum to bring about amendment of the Constitution. It has, however, been expressly provided in the article that referendum does not take place if a law has been approved in its second vote by a majority of two-thirds of the members of each chamber. The Italian Constitution thus makes a vote of majority of two-thirds of the members of each chamber at the second voting as effective as a referendum. Article 89 of the Constitution of the French Fifth Republic likewise makes provision for referendum for amendment of Constitution. It is, however, provided in that article that the proposed amendment is not submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in that case the proposed amendment is approved only if it is accepted by three-fifth majority of the votes cast.

1410. We may at this stage advert to Article 5 of the United States Constitution which reads as under:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislature of two-thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The above article makes it clear that there are two methods of framing and proposing amendments.

(*A*) Congress may itself, by a two-thirds vote in each house, prepare and propose amendments.

(*B*) The legislatures of two-thirds of the States may require Congress to summon a Constitutional Convention. Congress shall thereupon do so, having no option to refuse; and the Convention when called shall draft and submit amendments. No provision is made as to the election and composition of the Convention, matters which would therefore appear to be left to the discretion of Congress.

1411. There are the following two methods of enacting amendments framed and proposed in either of the foregoing ways. It is left to Congress to prescribe one or other method as Congress may think fit.

(*X*) The legislatures of three-fourths of the States may ratify any amendments submitted to them.

(*Y*) Conventions may be called in the several States, and three-fourths of these conventions may ratify.

1412. Except for Twenty-first Amendment, on all the occasions on which the amending power has been exercised, method *A* has been employed and method *X* for ratifying—i.e. no drafting conventions of the whole Union or ratifying conventions in the several States have ever been summoned. The consent of the President is not required to a Constitutional amendment (see *American Commonwealth* by James Bryce, pp. 365-366).

1413. There is one provision of the Constitution which cannot be changed by this process. It is that which secures to each and every State equal representation in one branch of the legislature because according to proviso to Article V, no States without its consent shall be deprived of its equal suffrage in the Senate.

1414. The question as to whether the width of power of amendment is greater in case the amendment is passed by a people's convention compared to the width of the power if it is passed by the prescribed majority in the legislatures arose in the case of *United States* v. *Sprague*[45] decided by the Supreme Court of the United States. In that case the Constitutional validity of the Eighteenth Amendment was assailed on the ground that it should have been ratified by the Conventions because it took away the powers of the States and conferred new direct powers over individuals. The Trial Court rejected all these views and yet held the Eighteenth Amendment unconstitutional on theories of "Political science", the "Political thought" of the times, and a "scientific approach to the problem of government". The United States Supreme Court on appeal upheld the Eighteenth Amendment.

After referrring to the provisions of Article 5 Roberts, J., who gave the opinion of the court, observed:

> "The choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. Appellees, however, pointed out that amendments may be of different kinds, as e.g., mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other. They say that the framers of the Constitution expected the former sort might be ratified by legislatures, since the States as entities would be wholly competent to agree to such alterations, whereas they intended that the latter must be referred to the people because not only of lack of power in the legislatures to ratify, but also because of doubt as to their truly representing the people."

Repelling the contention on behalf of the appellees, the court observed:

> "If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article 5 as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended."

The court referred to the Tenth Amendment which provided that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people". The argument that the language of the Tenth Amendment demonstrates that the people reserved to themselves powers over their personal liberty, that the legislatures were not competent to enlarge the powers of Federal Government in that behalf and that the people never delegated to the Congress the unrestricted power of chosing the mode of ratification of a proposed amendment was described by the Court to be complete non sequitur. The fifth Article, it was observed, does not purport to delegate any governmental power to the United states, nor to without any from it. On the contrary, that article is a grant of authority by the people to Congress, and not to the United States. The court further observed:

> "They (the people) deliberately made the grant of power to

[45] 282 US 716,

> Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification."

1415. I am, therefore, of the view that there is no warrant for the proposition that as the amendments under Article 368 are brought about by the prescribed majority of the two Houses of Parliament and in certain cases are ratified by the State Legislatures and the amendments are not brought about through referendum or passed in a Convention, the power of amendment under Article 368 is on that account subject to limitations.

1416. Argument has then been advanced that if power be held to be vested in Parliament under Article 368 to take away or abridge fundamental rights, the power would be, or in any case could be, so used as would result in repeal of all provisions containing fundamental rights. India, it is urged, in such an event would be reduced to a police state wherein all cherished values like freedom and liberty would be non-existent. This argument, in may opinion, is essentially an argument of fear and distrust in the majority of representatives of the people. It is also based upon the belief that the power under Article 368 by two-thirds of the members present and voting in each House of Parliament would be abused or used extravagantly. I find it difficult to deny to the Parliament the power to amend the Constitution so as to take away or abridge fundamental right by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power. I may in this context refer to the observations of Marshall, C. J., regarding the possibility of the abuse of power of legislation and of taxation in the case of *The Providence Bank* v. *Alpheus Billings*,[46]:

> "This vital power may be abused; but the Constitution of the United Stated was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

1417. That power may be abused furnishes no ground for denial of its existence if government is to be maintained at all, is a proposition, now too well established (see the unanimous opinion of US Supreme Court in *Ex parte John L. Rapier*.[47] Same view was expressed by the Judical Committee in the case of *Bank of Toronto and Lambe*,[48] while dealing with the provisions of Section 92 of the British North America Act relating to the power of Quebec Legislature.

1418. Apart from the fact that the possibility of abuse of power is no ground for the denial of power if it is found to have been legally vested, I find that the power of amendment under Article 368 has been vested not in one individual but in the majority of the representatives of the people in Parliament. For this purpose, the majority has to be of not less than two-thirds of the members present and voting in each House. In addition to that, it is required that the amendment Bill should be passed in each House by a majority of the total membership of that House. It is, therefore, not possible to pass an amendment Bill by a snap vote in a House wherein a small number of member are present to satisfy the requirement of the rule of quorum. The condition about the passing of the Bill by each House, including the Rajya Sabha, by prescribed majority ensures that it is not permissible to get the Bill passed in a joint sitting of the two Houses (as in the case of ordinary legislation) wherein the members of the Rajya Sabha can be out voted by the members of the Lok Sabha because of the latter's greater numerical strength. The effective voice of the Rajya Sabha in the passing of the amendment Bill further ensures that unless the prescribed majority of the representatives of the States agree the bill cannot be passed. The Rajya Sabha under our Constitution is a perpetual body ; its members are elected by the members of the State Assemblies and one-third of them retire every two years. We have besides that the provision for the ratification of the amendment by not less than one-half of the State Legislatures in case the amendment relates to certain provisions which impinge upon the rights of the States. The fact that a prescribed majority of the people's representatives is required for bringing about the amendment is normally itself a guarantee that the power would not be abused. The best safeguard against the abuse or extravagant use of power is public opinion and not a fetter on the right of people's representatives to change the Constitution by following the procedure laid down in the Constitution itself. It would not be a correct approach to start with a distrust in the people's representatives in the Parliament and to assume that majority of them would have an aversion for the liberties of the people and would act against the public interest. To quote the words of Justice Holmes in *Missouri Kansas & Texas Rly.* v. *May*.[49]

---

[46] 29 US 514.

[47] 15 US 93: 26 Law Ed. 110.

[48] 12 AC 575.

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

1419. L. B. Orfield has dealt with the question of the abuse of power in his book "*The Amending of Federal Constitution*", in the following words on page 123 :

> " 'Abuse' of the amending power is an anomalous term. The proponents of implied limitations resort to the method of reductio ad absurdum in pointing out the abuses which might occur if there were no limitations on the power to amend.........The amending power is a power of an altogether different kind from the ordinary governmental powers. If abuse occurs, it occurs at the hands of a special organization of the nation and of the States representing an extraordinary majority of the people, so that for all practical purposes it may be said to be the people, or at least the highest agent of the people, and one exercising sovereign powers. Thus the people merely take the consequences of their own acts."

It has already been mentioned above that the best safeguard against the abuse of power is public opinion. Assuming that under the sway of some overwhelming impulse, a climate is created wherein cherished values like liberty and freedom lose their significance in the eyes of the people and their representatives and they choose to do away with all fundamental rights by amendment of the Constitution, a restricted interpretation of Article 368 would not be of much avail. The people in such an event would forfeit the claim to have fundamental rights and in any case fundamental rights would not in such an event save the people from political enslavement, social stagnation or mental servitude. I may in this context refer to the words of Learned Hand in his eloquent address on the *Spirit of Liberty*:

---

[49] 194 U.S. 267 (on p. 270).

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution no law no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow." (*see* pages 189-190 *Spirit of Liberty* edited by Irving Dilliard).

Similar idea was expressed in another celebrated passage by Learned Hand in the *Contribution of an Independent Judiciary to Civilization*:

> "You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation, I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." (*see* p. 164 supra).

1420. It is axiomatic that the involvement of a nation in war by a declaration of war against another country can change the entire course of history of the nation. A wrong decision in this respect can cause untold suffering, result in national humiliation, take toll of thousands of lives and cripple the economy of the nation for decades to come. If the Government and the Parliament can be entrusted with power of such far reaching magnitude on the assumption that such a power would not be abused but would be exercised reasonably in the national interest, it would seem rather anomalous to have an approach of distrust in those very organs of the State and to deny to the Parliament the power of amendment of fundamental rights because of the supposed possibility of the abuse of such power.

1421. There is one other aspect of the matter which may be not lost sights of. Part III deals with a number of fundamental rights. Assuming that one relating to property, out of the many fundamental rights, is found to be an obstacle in pushing forward certain ameliorative measures and it is proposed to abridge that fundamental rights and it is also decided not to abridge or take away any other fundamental right, the present position, according to the stand taken on behalf of the petitioners is that there is no power under Article 368 to abridge the obstructive fundamental right. The result is that even though reference is made on behalf of the petitioners to those fundamental rights as enshrine within themselves the valued concept of liberty of person and freedom of expression, the protection which is, in fact sought is for the fundamental right to property which causes obstruction to pushing forward ameliorative measures of national weal. It is not, in my opinion, a correct approach to assume that if Parliament is held entitled to amend Part III of the Constitution so as to take away or abridge fundamental rights, it would automatically or necessarily result in the abrogation of all fundamental rights. I may mention in this context that for seventeen years, from 1950 till 1967 when *Golak Nath case* (supra) was decided, the accepted position was that the Parliament had the power to amend Part III of the Constitution so as to take away or abridge fundamental rights. Despite the possession of that power by the Parliament, no attempt was made by it to take away or abridge fundamental rights relating to cherished values like liberty of person and freedom of expression. If it was not done in the past, why should we assume that the majority of members of the Parliament in future would acquire sudden aversion and dislike for these values and show an anxiety to remove them from the Constitution. There is a vital distinction, in my opinion, between the vesting of a power, the exercise of the power and the manner of its exercise. What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in my opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained.

1422. In the context of abuse of power of the amendment, reference has been made on behalf of the petitioners to the Constitution of Weimar Republic and it is urged that unless there are restrictions on the power of amendment in so far as fundamental rights are concerned, the danger is that the Indian Constitution may also meet the same fate as did the Weimar Constitution at the hands of Hitler. This argument, in my opinion, is wholly misconceived and is not based upon correct appreciation of historical facts. Following military reversals when Kaiser fled to Holland in 1918 his mutinous subjects proclaimed a republic in Germany. There was thus a break in the continuity of the authority and the Weimar Republic had to face staggering political problems. It had to bear the burden of concluding a humilitating peace. It was later falsely blamed for the defeat itself by some of the politicians who were themselves responsible for the collapse and capitulation of 1918. The Republic had to wrestle, within a decade and a half, with two economic crises of catastrophic proportions which ruined and made desparate the ordinarily stable elements of society. The chaos with political party divisions in the country was reflected in Reichstag where no party obtained a clear majority. There were 21 cabinets in 14 years. It was in those conditions that Hitler emerged on the scene. He made use of Article 48 of the Weimar Constitution which dealt with emergency powers. Under Article 48 of the Constitution, the President was empowered to issue decrees suspending the rights guaranteed by the basic law and to make direct use of the army and navy should emergency conditions so require. The purpose of the provisions was, of course, to provide the executive with means to act in the event of some grave national emergency where the immediate and concentrated use of the power of the state might become suddenly necessary. But what happened was that almost from its beginning the government found itself in one emergency after another, so that rule by executive decrees issued under the authority provided for by Article 48 supplanted the normal functioning of the legislative branch of government. The increasing division among the political parties, the staggering economic problem and the apparent failure of the parliamentary government to function, were accompanied by the steady growth in power of the National Socialists under Hitler. In less than two years, the Weimar Republic was transformed into a totalitarian dictatorship. The Enabling Act of March 23, 1933, pushed through the Reichstag by a narrow Nazi majority, provided

SCC Online

Government by decree without regard to constitutional guarantees. The Act empowered the Government to enact the statutes without the sanction of the Parliament. Hitler made a show of following the Constitution, but the acts of his party in and out of the government in practice violated the basic law. The few limitations imposed upon the government were ignored, and Hitler's Third Reich was launched (see *Modern Constitutions* by R. F. Moore, pp. 86-87 and *The Constitutions of Europe* by E. A. Goerner, pp. 99-100). It would thus appear that it was not by use of the power of amending the Constitution but by acting under the cover of Article 48 of the Constitution dealing with emergency powers that Hitler brought about the Nazi dictatorship. He thus became what has been described as "...... the supreme political leader of the people, supreme leader and highest superior of the administration, supreme judge of the people, supreme commander of the armed forces and the source of all law."

1423. Apart from the fact that the best guarantee against the abuse of power of amendment is good sense of the majority of the members of Parliament and not the unamendability of Part III of the Constitution, there is one other aspect of the matter. Even if Part III may be left intact, a mockery of the entire parliamentary system can be made by amending Articles 85 and 172 which are not in Part III and according to which the life of the Lok Sabha and Vidhan Sabhas of the States, unless sooner dissolved, would be five years, and by providing that the life of existing Lok Sabha and Vidhan Sabhas shall be fifty years. This would be a flagrant abuse of the power of amendment and I refuse to believe that public opinion in our country would reach such abysmal depths and the standard of political and constitutional morality would sink so low that such an amendment would ever be passed. I need express no opinion for the purpose of this case as to whether this Court would also not quash such an amendment. In any case such an amendment would be an open invitation for and be a precursor of revolution.

1424. Even without amending any article, the emergency provisions of the Constitution contained in Articles 358 and 359 can theoretically be used in such a manner as may make a farce of the democratic set up by prolonging the rule of the party in power beyond the period of five years since the last general election after the party in power has lost public support. A Proclamation of Emergency under Article 352 can be issued by the President if he is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or even by internal disturbance. Such a Proclamation has to be laid before each House of Parliament. Resolution approving the Proclamation has thereafter to be passed by the Houses of Parliament. According to Article 83, the House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and no extending in any case beyond a period of six months after the Proclamation has ceased to operate. As the Government and Parliament play a vital part in the Proclamation and continuation of emergency, the emergency provisions can theoretically be used for avoiding the election and continuing a party in power even though it has lost popular support by extending the life of the House of the People in accordance with Article 83(2). The effective check against such unabashed abuse of power is the sense of political responsibility, the pressure of public opinion and the fear of popular uprising. We need not go into the question as to whether the court would also intervene in such an event. It is, in my opinion, inconceivable that a party would dare to so abuse the powers granted by the emergency provisions. The grant of the above power under Article 83(2) is necessarily on the assumption that such a power would not be abused.

1425. Argument has then been advanced on behalf of the petitioners that the power of amendment might well be used in such a manner as might result in doing away with the power of amendment under Article 368 or in any case so amending that article as might make it impossible to amend the Constitution. It is, in my opinion, difficult to think that majority of members of future Parliament would attempt at any time to do away with the power of amendment in spite of the knowledge as to what was the fate of unamendable constitutions in other countries like France. Assuming that at any time such an amendment to abolish all amendments of Constitution is passed and made a part of the Constitution, it would be nothing short of laying the seeds of a future revolution or other extra-constitutional methods to do away with unamendable Constitution. It is not necessary for the purpose of this case to go into the question of the constitutional validity of such an amendment.

1426. We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word "amendment". Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion, that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the rentention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

1427. The words "amendment of this Constitution" and "the Constitution shall stand amended" in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that article, repeal the existing Constitution and replace it by a new Constitution.

1428. The connotation of the amendment of the Constitution was brought out clearly by Pt. Nehru in the course of his speech in support of the First Amendment wherein he said that "a Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it". It is, therefore, plain that what Pt. Nehru contemplated by amendment was the varying of the Constitution "here and there" and not the elimination of its basic structure for that would necessarily result in the Constitution losing its identity.

1429. Reference to some authorities in the United States so far as the question is concerned as to whether the power to amend under Article 5 of U.S. Constitution would include within itself the power to alter the basic structure of the Constitution are not helpful because there has been no amendment of such a character in the United States. No doubt the Constitution of the United States had in reality, though not in form, changed a good deal since the beginning of last century; but the change had been effected far less by formally enacted constitutional amendments than by the growth of customs or institutions which have modified the working without altering the articles of the Constitution (see *The Law of the Constitution* by A.V. Dicey, Tenth Ed. p. 129).

1430. It has not been disputed during the course of arguments that the power of amendment under Article 368 does not carry within itself the power to repeal the entire Constitution and replace it by a new Constitution. If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives.

1431. Although there are some observations in "*Limitations of Amendment Procedure and the Constituent Power*" by Conrad to which it is not possible to subscribe, the following observations, in my opinion, represent the position in a substantially correct manner:

> "Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority."

It has further been observed:

> "The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal "expression of underlying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the medicatrix (*Sic*) of the system', but should not touch its fundations."

A similar idea has been brought out in the following passage by Carl, J., Friedrich, page 272 of "*Man and His Government*" (1963):

> "A Constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper function, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts it destroyed. The United States may retain some kind of constitutional government, without, say, the Congress or the federal division of powers, but it would not be the constitutional system now prevailing. This view is uncontested even by many who do not work with the precise concept of a Constitution here insisted upon."

1432. According to "*The Construction of Statutes*" by Crawford, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or in some way changed or altered in order to make it more complete or perfect or effective. It should be noticed, however, that an amendment is not the same as repeal, although it may operate as a repeal to a certain degree. Sutherland in this context states that any change of the scope or effect of an existing statute whether by addition, omission, or substitution of provisions which does not wholly terminate its existence whether by an Act purporting to amend, repeal, revise or supplement or by an Act independent and original in form, is treated as amendatory.

1433. It is, no doubt, true that the effect of the above conclusion at which I have arrived is that there would be no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework. This fact, in my opinion, would not show that our Constitution has a lacuna and is not a perfect or a complete organic instrument, for it is not necessary that a Constitution must contain a provision for its abrogation and replacement by an entirely new and different Constitution. The people in the final analysis are the ultimate sovereign and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose.

1434. Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various article including those relating to fundamental rights. During the course of years after the Constitution comes into force, difficulties can be experienced in the working of the Constitution. It is to overcome those difficulties that the Constitution is amended. The amendment can take different forms. It may sometimes be necessary to repeal a particular provision of the Constitution without substituting another provision in its place. It may in respect of a different article become necessary to replace it by a new provision Necessity may also be felt in respect of a third article to add some further clauses in it. The addition of the new clauses can be either after repealing some of the earlier clauses or by adding new clauses without repealing any of the existing clauses. Experience of the working of the Constitution may also make it necessary to insert some new and additional articles in the Constitution. Likewise, experience might reveal the necessity of deleting some existing articles. All these measures, in my opinion, would lie within the ambit of the power of amendment. The denial of such a broad and comprehensive power would introduce a rigidity in the Constitution as might break the Constitution. Such a rigidity is open to serious objection in the same way as an unamendable Constitution.

1435. The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental right and the scope and width of that power when it deals with provisions not concerned with fundamental rights.

1436. We have been referred to the dictionary meaning of the word "amend", according to which, to amend is to "free from faults, correct, rectify reform, make alteration, to repair to better and surpass". The dictionary meaning of the word "amend" or "amendment", according to which power of amendment should be for purpose of bringing about an improvement, would not, in my opinion, justify a restricted construction to be placed upon those words. The sponsors of every amendment of the Constitution would necessarily take the position that the proposed amendment is to bring about an improvement on the existing Constitution. There is indeed an element of euphemism in every amendment because it proceeds upon the assumption on the part of the proposer that the amendment is an improvement. In the realities and controversies of politics, question of improvement becomes uncertain with the result that in legal parlance the word amendment when used in reference to a constitution signifies change or alteration. Whether the amendment is in fact an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a judge regarding the wisdom behind or the improving quality of an amendment, he would be only concerned with the legality of the amendment and this, in its turn, would depend upon the question as to whether the formalites prescribed in Article 368 have been complied with.

1437. The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings. A Constitution is essentially different from pleadings filed in court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had (*sic*) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future. The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

> "…………the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." [See *Gompers* v. *United States*, 233 U.S. 604, 610 (1914)].

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

> "Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society." (See "*Mr. Justice Holmes*" edited by Felix Frankfurter, p. 58).

1438. The principles which should guide the court in construing a Constitution have been aptly laid down in the following passage by Kania, C. J., in the case of *A. K. Gopalan* v. *The State of Madras*[50]:

> "In respect of the construction of a Constitution Lord Wright in *James* v. *The Commonwealth of Australia*,[51] observed that 'a Constitution must not be construed in any narrow or pedantic sense'. Mr. Justice Higgins in *Attorney-General of New South Wales* v. *Brewery Employees Union*,[52] observed: 'Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be. In *In re the Central Provinces and Berar Act XIV of 1938*,[53] Sir Maurice Gwyer, C. J., after

---

[50] 1950 SCR 88 at p. 119-121: AIR 1950 SC 27: 1950 SCJ 174:

[51] 1936 AC 578 at 614.

[52] (1908) 6 Com LR 469 at pp. 611-12.

[53] 1939 FCR 18 at p. 37: AIR 1939 FC 1: (1939) 1 MLJ Supp 1.

adopting these observations said: 'Especially is this true of a Federal Constitution with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert to language of the enactment in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors'. There is considerable authority for the statement that the Courts are not at liberty to declare an Act viod because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void and any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."

1439. Reference has been made on behalf of the petitioners to Para 7 of the Fifth Schedule to the Constitution which empowers the Parliament to amend by way of addition, variation or repeal any of the provisions of that Schedule dealing with the administration and control of scheduled areas and scheduled tribes. Likewise, Para 21 of the Sixth Schedule gives similar power to the Parliament to amend by way of addition, variation or repeal any of the provisions of the Sixth Schedule relating to the administration of tribal areas. It is urged that while Article 368 contains the word "amendment" simpliciter, the above two paragraphs confer the power to amend by way of addition, variation or repeal and thus enlarge the scope of the power of amendment. This contention, in my opinion, is not well founded. The words "by way of addition, variation or repeal" merely amplify the meaning of the word "amend" and clarify what was already implicit in that word. It, however, cannot be said that if the words "by way of addition, variation or repeal" had not been there, the power of amendment would not have also included the power to add, vary or repeal. These observations would also hold good in respect of amended Section 291 of the Government of India Act, 1935 which gave power to the Governor-General at any time by Order to make such amendments as he considered necessary whether by way of addition, modification or repeal, in the provisions of that Act or of any Order made thereunder in relation to any Provincial Legislature with respect to the matters specified in that section. A clarification by way of abundant caution would not go to show that in the absence of the clarification, the power which inheres and is implicit would be non-existent. Apart from that, I am of the view that sub-paragraph (2) of Paragraph 7 of the Fifth Schedule indicates that the word "amendment" has been used in the sense so as to cover amendment by way of addition, variation or repeal. According to that paragraph, no law mentioned in

SCC Online

sub-paragraph (1) shall be deemed to be an amendment of the Constitution for purpose of Article 368. As sub-paragraph (1) deals with amendment by way of addition, variation or repeal, the amendment of Constitution for purpose of Article 368 referred to in sub-paragraph (2) should be construed to be co-extensive and comprehensive enough to embrace within itself amendment by way of addition, variation or repeal. The same reasoning would also apply to sub-paragraph (2) of Paragraph 21 of the Sixth Schedule.

1440. The Judicial Committee in the case of *British Coal Corporation* v. *The King*,[54] laid down the following rule:

> "In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

The Judicial Committee also quoted with approval the following passage from Clement's *Canadian Constitution* relating to provision of British North America Act:

> "But there are statutes and statutes, and the strict construction deemed proper in the case, for example of a penal or taxing statute, or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government........."

Orfield, while dealing with the amendment of the Constitution has observed that the amendment of a Constitution should always be construed more liberally. To quote from his book "*The Amending of the Federal Constitution*" (p. 158):

> "Is there a restriction that an amendment cannot add but only alter? An argument very much like the foregoing is that an amendment may alter but may not add. This contention is largely a quibble on the definition of the word 'amendment'. It is asserted that by amending the Constitution is meant the changing of something that is already in the Constitution, and not the addition of something new and unrelated. Cases prescribing the very limited meaning of amendments in the law of pleading are cited as authoritative. It would seem improper however, to accept such a definition, as amendments to constitutions have always been construed more liberally and on altogether different principles from those applied to amendments of pleadings."

1441. It may also be mentioned that Article V of the U.S. Constitution confers powers of amendment. The word used in that article is amendment simplciter and not amendment by way of addition, alteration or repeal. In pursuance of the power conferred by Article V, Article XVIII was added to the American Constitution by the Eighteenth Amendment. Subsequently that article (Article XVIII) was repealed by the Twenty-first Amendment. Section 1 of Article XXI was in the following words:

> "The Eighteenth Article of amendment to the Constitution of the United States is hereby repealed."

The addition of the Eighteenth Article, though challenged, was upheld by the Supreme Court. No one has questioned the repeal of the eighteenth article on the ground that the power of amendment would not include the power to repeal.

---

[54] 1935 AC 500.

1442. I cannot subscribe to the view that an amendment of the Constitution must keep alive the provision sought to be amended and that it must be consistent with that provision. Amendment of Constitution has a wide and broad connotation and would embrace within itself the total repeal of some articles or their substitution by new articles which may not be consistent with or in conformity with earlier articles. Amendment in Article 368 has been used to denote change. This is clear from the opening words of the proviso to Article 368 according to which ratification by not less than half of State Legislatures would be necessary if amendment seeks to make a change in the provisions of the Constitution mentioned in the proviso. The word change has a wide amplitude and would necessarily cover cases of repeal and replacement of earlier provisions by new provisions of different nature. Change can be for the better as well as for the worse. Every amendment would always appear to be a change for the worse in the eyes of those who oppose the amendment. As against that, those who sponsor an amendment would take the stand that it is a change for the better. The court in judging the validity of an amendment would not enter into the arena of this controversy but would concern itself with the question as to whether the constitutional requirements for making the amendment have been satisfied. An amendment of the Constitution in compliance with the procedure prescribed by Article 368 cannot be struck down by the court on the ground that it is a change for the worse. If the court were to strike down the amendment on that ground, it would be tantamount to the court substituting its own opinion for that of the Parliament, reinforced in certain cases by that of not less than half of State Legislatures, regarding the wisdom of making the impugned Constitutional amendment. Such a course, which has the effect of empowering the court to sit in appeal over the wisdom of the Parliament in making constitutional amendment, on the supposed assumption that the court has superior wisdom and better capacity to decide as to what is for the good of the nation is not permissible. It would, indeed, be an unwarranted incursion into a domain which essentially belongs to the representatives of the people in the two Houses of Parliament, subject to ratification in certain cases by the State Legislatures. We may in this context recall the words of Holmes, J., in *Lochner* v. *New York*:[55]

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."

The above observations were contained in the dissent of Holmes, J. The above dissent has subsequently been accepted by the U.S. Supreme Court to lay down the correct law (see *Ferguson* v. *Skrupa*[56] wherein it has been observed by the court:

> "In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co.* v. *Parrish*, 300 US 379, 81 L Ed 703, 57 S Ct 578, 108 ALR 1330(1937)..............................
> We refuse to sit as a 'superlegislature to weigh the wisdom of legislation', and we emphatically refuse to go back to the time when courts used the

---

[55] (1904) 198 US 45.

[56] (1963) 372 US 726.

SCC Online

Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought'."

1443. It has also been urged on behalf of the petitioners that the framers of the Constitution could not have intended that even though for the amendment of articles referred to in the proviso to Article 368, ratification of not less than one-half of the State Legislatures would be necessary, in the case of an amendment which deals with such vital matters as the taking away or abridgment of fundamental rights, the amendment could be brought about without such a ratification. This argument, in my opinion, is untenable. The underlying fallacy of this argument is that it assumes that ratification by the State Legislatures is necessary under the proviso in respect of constitutional amendments of great importance, while no such ratification is necessary in the case of comparatively less important amendments. Plain reading of Article 368, however, shows that ratification by the State Legislatures has been made imperative in the case of those constitutional amendments which relate to or affect the rights of the States. In other cases no such ratification is necessary. The scheme of Article 368 is not to divide the articles of the Constitution into two categories, *viz.*, important and not so important articles. What Article 368 contemplates is that the amending power contained in it should cover all the articles leaving aside those provisions which can be amended by Parliament by bare majority. In the case, however, of such of the articles as relate to the federal principle or the relations of the States with the Union, the framers of the Constitution put them in the proviso and made it imperative to obtain ratifications by not less than half of the State Legislatures in addition to the two-thirds majority of the members present and voting in each House of the Parliament for bringing about the amendment. It is plain that for the purpose of ratification by the State Legislatures, the framers of the Constitution attached greater importance to the federal structure than to the individual rights. Such an approach is generally adopted in the case of a provision for amendment of the federal Constitution. K.C. Wheare in his book on the *Federal Government* has observed on page 55 :

> "It is essential in a federal government that if there be a power of amending the Constitution, that power, so far at least as concerns those provisions of the Constitution which regulate the status and powers of the general and regional government, should not be confided exclusively either to the general governments or to the regional governments."

We may in this context refer to the speech of Dr.Ambedkar who while dealing with the category of articles for the amendment of which ratification by the States was required, observed :

> "Now we have no doubt put certain articles in a third category where for the purposes of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States. I shall explain why we think that in the case of certain articles it is desirable to adopt this procedure. If Members of the House who are interested in this matter are to examine the articles that have been put under the proviso, they will find that they refer not merely to the centre but to the relations between the centre and the provinces. We can not forget the fact that while we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that the federal structure of the Constitution remains fundamentaly unaltered. We have by our laws given certain rights to

provinces, and reserved certain rights to the centre. We have distributed Legislative authority; we have distributed executive authority and we have distributed administrative authority. Obviously to say that even those articles of the Constitution which pertain to the administrative, legislative, financial and other powers, such as the executive powers of the provinces should be made liable to alteration by the Central Parliament by two-thirds majority, without permitting the provinces or States to have any voice, is in my judgment altogether nullifying the fundamentals of the Constitution."

1444. Learned counsel for the petitioners has addressed us at some length on the point that even if there are no express limitations on the power of amendment, the same is subject to implied limitations, also described as inherent limitations. So far as the concept of implied limitations is concerned, it has two facets. Under the first facet, they are limitations which flow by necessary implications from express provisions of the Constitution. The second facet postulates limitations which must be read in the Constitution irrespective of the fact whether they flow from express provisions or not because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence. It is also stated that those higher values constitute the spirit and provide the scheme of the Constitution. This aspect of implied limitations is linked with the existence of natural rights and it is stated that such rights being of paramount character, no amendment of Constitution can result in their erosion.

1445. It may at this stage clarify that there are certain limitations which inhere and are implicit in the word "amendment". These are limitations which flow from the use of the word "amendment" and relate to the meaning or construction of the word "amendment". This aspect has been dealt with elsewhere while construing the word 'amendment'. Subject to this clarification, we may now advert to the two facets of the concept of implied limitations referred to above.

1446. So far as the first facet is concerned regarding a limitation which flows by necessary implication from an express provision of the Constitution, the concept derives its force and is founded upon a principle of interpretation of statutes. In the absence of any compelling reason it may be said that a constitutional provision is not exempt from the operation of such a principle. I have applied this principle to Article 368 and despite that, I have not been able to discern in the language of that article or other relevant articles any implied limitation on the power to make amendment contained in the said article.

1447. We may now deal with the second aspect of the question which pertains to limitation on the power of making amendment because such a limitation, though not flowing from an express provision, is stated to be based upon higher values which are very dear to the human heart and are considered essential traits of civilized existance. So far as this aspect is concerned, one obvious objection which must strike every one is that the Constitution of India is one of the lengthiest Constitutions, if not the lengthiest, of the world. The framers of the Constitution dealt with different constitutional matters at considerable length and made detailed and exhaustive provisions about them. Is it then conceivable that after having dealt with the matter so exhaustively and at such great length in express words, they would leave things in the realm of implication in respect of such an important article as that relating to the amendment of the Constitution? If it was intended that limitations should be read on the power of making amendment, question would necessarily arise as to why the framers of the Constitution refrained from expressly incorporating such limitations on the power of amendment in the Constitution itself. The theory of implid limitations on the power of making amendment may have some fascination and attraction for political theorists, but a deeper reflection would reveal that such a theory is based upon a doctrinaire approach and not what is so essential for the purpose of construing and working a Constitution, viz., a pragmatic and practical approach. This circumstance perhaps accounts for the fact that the above theory of implied limitations has not been accepted by the highest court in any country.

1448. As the concept of implied limitations on the power of amendment under the second aspect is not based upon some express provision of the Constitution, it must be regarded as essentially nebulous. The concept has no definite contours and its acceptance would necessarily introduce elements of uncertainty and vagueness in a matter of so vital an importance as that pertaining to the amendment of the Constitution. Whatever might be the justification for invoking the concept of implied limitations in a short Constitution, so far as the Constitution of India with all its detailed provisions is concerned, there is hardly any scope or justifications for invoking the above concept. What was intended by the framers of the Constitution was put in express words and, in the absence of any words which may expressly or by necessary implication point to the existence of limitations on the power of amendment, it is, in my opinion, not permissible to read such limitation in the Constitution and place them on the power of amendment. I find it difficult to accede the submission that the framers af the Constitution after having made such detailed provisions for different subjects left something to be decided by implication, that in addition to what was said there were things which were not said but which were intended to be as effective as things said. The quest for things not said, but which were to be as effective as things said, would take us to the realm of speculation and theorising and must bring in its wake the uncertainty which inevitably is there in all such speculation and theorising. All the efforts of the framers of the Constitution to make its provisions to be definite and precise would thus be undone. We shall be in doing so, not merely ignoring but setting at naught what must be regarded as a cardinal principle that a Constitution is not a subject of fastidious and abstract dialectics but has to be worked on a practical plane so that it may become a real and effective vehicle of the nation's progress. As observed by Story in Para 451 of the *Constitution of the United States*, Volume I: Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning; or for the exercise of philosophical acuteness, or judicial research. They are instruments of practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.

1449. In the *National Prohibition cases* (supra) the petitioners challenged before the U.S. Supreme Court the validity of the Eighteenth Amendment relating to prohibition. It was urged that the aforesaid amendment had resulted in encroachment upon the police power of the States. There was implied limitation on the power to make such an amendment, according to the petitioners in those cases, under Article 5 of the U. S. Constitution. Although the Supreme Court gave no reasons in support of its conclusions, it upheld the validity of the Eighteenth Amendment. Argument about the implied limitations on the power of amendment was thus tacitly rejected.

1450. Eminent authors like Rottschaefer and Willis have taken the view that the theory of implied limitations should be taken to have been rejected in the *National Prohibition cases* (supra) by the U. S. Supreme Court. Rottschaefer in *Handbook of American Constitutional Law* has observed on pages 8 to 10:

> "The only assumption on which the exercise of the amending power would be inadequate to accomplish those results would be the existence of express or implied limits on the subject-matter of amendments. It has been several times contended that the power of amending the federal Constitution was thus limited, but the Supreme court has thus far rejected every such claim, although at least one state court has subjected the power of amending the state Constitution to an implied limit in this respect. The former position is clearly the more reasonable, since the latter implies that the ultimately sovereign people have inferentially deprived themselves of that portion of their sovereign power, once possessed by them, of determining the content of their own fundamental law."

1451. Question of implied limitation on the powers to make amendmet also arose in the case of *Jeremish Ryan and Others* v. *Captain Michael Lennon*[57]. Article 50 of the Constitution of the Irish Free State which came into force on December 6, 1922, as originally enacted, provided as follows:

> "Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a a majority of the votes on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters in the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof."

1452. By the Constitution (Amendment No. 10) Act, 1928, passed within the said period of eight years, the Constitution was amended by, inter alia, the deletion of Article 47 (dealing with referendum) and the deletion from Article 50 of the words "and as such shall be subject to the provisions of Article 47 thereof". By the Constitution (Amendment No. 16) Act, 1929, also passed within the said period of eight years, Article 50 was amended by the substitution of the words "sixteen years" for the words "eight years" therein. By the Constitution (Amendment No. 17) Act, 1931 the Constitution was amended by inserting therein a provision relating to the establishment of a Tribunal consisting of officers of Defence Forces to try a number of offences. Power of detention on suspicion in certain cases was also conferred. It was in the context of the validity of the establishment of such Tribunals that the question arose as to whether there was an implied limitation on the power to make amendment. It was held by the Supreme Court (Fitz Gibbon and Murnaghan, JJ. and Kennedy, C.J., dissenting), while dealing with the first two amendments, that these enactments were within the power of amendment conferred on the Oireachtas by Article 50 and were valid amendments of the Constitution; and that, consequently, an amendment of the Constitution enacted after the expiry of the original period of eight years was not invalid by reason of not having been submitted to a referendum of the people under Article 50 or Article 47 as originally enacted. Dealing with the Constitution (Amendment No. 17) Act, 1931 it was held by the same majority that it was a valid amendment and was not ultra vires by reason of involving a partial repeal of the Constitution or by reason of conflicting with specific articles of the Constitution such as Article 6 relating to the liberty of the person, Article 64 relating to the exercise of judicial power or Article 72 relating to the trial by jury or by reason of infringing or abrogating other articles of the Constitution or principles underlying the various articles of the Constitution which were claimed to be fundamental and immutable. Kennedy, C.J., after referring to the different articles of the Constitution, held that there was not, either expressly or by necessary implication, any power to amend the power of amendment itself. He observed in this connection:

---

[57] 1935 Irish Reports p. 170.

> "No doubt the Constituent Assembly could, if it had so intended, have given a power of amendment of the power to amend the Constitution, but in that case it would seen far more likely that it would rather have conferred on the Oireachtas a general open and free power of amendment of the Constitution, unlimited in scope and without limiting and restraining requirements for its exercise, than have done the same thing indirectiy by giving a strictly limited power with power to remove the limitations. The Constituent Assembly clearly, to my mind, did not so intend. In my opinion, on the true interpretation of the power before us, upon a consideration of the express prohibition, limitations and requirements of the clause containing it, the absence of any express authority, the donation of the effective act in the exercise of the power to the people as a whole, the relevant surrounding circumstances to which I have already referred, and the documents and their tenor in their entirety, there is not here, either expressly or by necessary implication, any power to amend the power of amendment itself."

Fitz Gibbon, J., dealt with this question in these words:

> "Unless, therefore, these rights appear plainly from the express provisions of our Constitution to be inalienable, and incapable of being modified or taken away by any legislative act, I cannot accede to the argument that the Oireachtas cannot alter, modify, or repeal them. The framers of our Constitution may have intended 'to bind man down from mischief by the chains of the Constitution', but if they did, they defeated their object by handing him the key of the padlock in Article 50."

Murnagham, J., observed:

> "The terms in which Article 50 is framed does authorise the amendment made and there is not in the Article any express limitation which excludes Article 50 itself from the power of amendment. I cannot, therefore, find any ground upon which the suggested limitation can be properly based."

1453. The theory of implied limitations on the power of amendment was thus rejected by the majority of the Judges of the Irish Supreme Court. It would further appear that the crucial question which arose for determination in that case was whether there was any power to amend the article relating to amendment of the Constitution or whether there was any restriction in this respect. No such question arises under our Constitution because there is an express provision in clause (*e*) of the proviso to Article 368 permitting such amendment. Apart from that I find that in the case of *Moore and Others* v. *The Attorney-General for the Irish Free State and Others*,[58] the counsel for the appellant did not challenge the constitutional validity of the 1929 amendment. The counsel conceded that the said amendment was regular and that the validity of the subsequent amendments could not be attacked on the ground that they had not been submitted to the people in a referendum. Dealing with the above concession, the Judicial Committee observed that the counsel had rightly conceded that point. The Judicial Committee thus expressed its concurrence with the conclusion of the majority of the Irish Supreme Court relating to the constitutional validity of the Amendment Act of 1929.

1454. A.B. Keith has also supported the view of the majority and has observed that the view of the Chief Justice in this respect was wrong (see *Letters on Imperial Relations*: *Indian Reform Constitutional & International Law* 1916-1935 p. 157). Keith observed in this connection:

> "But that the Chief Justice was wrong on this head can hardly be denied. Article 50 of the Constitution, which gave the power for eight years to effect changes by simple Act, did not prevent alteration of that Article itself, and, when the Constitution was enacted, it was part of the constitutional law of the Empire that a power of change granted by a Constitution applies to authorise change of the power itself, unless it is safeguarded, as it normally is, by forbidding change of the section giving the power. The omission of this precaution in the Free State Constitution must have been intentional, and therefore it was natural that the Dail, at Mr. Consgrave's suggestion, and with the full approval of Mr. de Valera, then in opposition should extend the period for change without a referendum."

1455. Dealing with the doctrine of implied limitations on the power of amendment, Orfield observes:

> "Today at a time when absolutes are discredited, it must not be too readily assumed that there are fundamental purposes in the Constitution which shackle the amending power and which take precedence over the general welfare and needs of the people of today and of the future." [see *The Amending of the Federal Constitution* (1942), p. 107].

It has been further observed:

> "An argument of tremendous practical importance is the fact that it would be exceedingly dangerous to lay down any limitations beyond those expressed. The critics of an unlimited power to amend have too often neglected to give due consideration to the fact that alteration of the federal Constitution is not by a simple majority or by a somewhat preponderate majority, but by a three-fourths majority of all the states. Undoubtedly, where a simple majority is required, it is not an especially serious matter for the courts to supervise closely the amending process both as to procedure and as to substance. But when so large a majority as three-fourths has finally expressed its will in the highest possible form outside of revolution, it becomes perilous for the judiciary to intervene." (*See* ibid p. 120).

---

[58] 1935 AC 484.

Orfield in this context quoted the following passage from a judicial decision:

> "Impressive words of counsel remind us of our duty to maintain the integrity of constitutional government by adhering to the limitations laid by the sovereign people upon the expression of its will.........Not less imperative, however, is our duty to refuse to magnify their scope by resort to subtle implication—Repeated decisions have informed us that only when conflict with the Constitution is clear and indisputable will a statute be condemned as void. Still more obvious is the duty of caution and moderation when the act to be reviewed is not an act of ordinary legislation but an act of the great constituent power which has made Constitutions and hereafter may unmake them. Narrow at such times are the bounds of legitimate implications." (*See* ibid p. 121).

H. E. Willis has rejected the theory of implied limitations in his book "*Constitutional Law of the United States*" in the following words:

> "But it has been contended that there are all sorts of implied limitations upon the amending power. Thus it has been suggested that no amendment is valid unless it is germane to some thing else in the Constitution, or if it is a grant of a new power, or if it is legislative in form, or if it destroys the powers of the states under the dual form of government, or if it changes the protection to personal liberty. The United States Supreme Court has brushed away all of these arguments, ..."(*see* p. 123).

1456. We may now deal with the concept of natural rights. Such rights are stated to be linked with cherished values like liberty, equality and democracy. It is urged that such rights are inalienable and cannot be affected by an amendment of the Constitution. I agree with the learned counsel for the petitioners that some of the natural rights embody within themselves cherished values and represent certain ideals for which men have striven through the ages. The natural rights have, however, been treated to be not of absolute character but such as are subject to certain limitations. Man being a social being, the exercise of his rights has been governed by his obligations to the fellow beings and the society, and as such the rights of the individual have been subordinated to the general weal. No one has been allowed to so exercise his rights as to impinge upon the rights of others. Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the state. It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the constitutional or statutory provisions, and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the state, and not subject to the amendatory process.

1457. It may be emphasised in the above context that those who refuse to subscribe to the theory of enforceability of natural rights do not deny that there are certain essential values in life, nor do they deny that there are certain requirements necessary for a civilized existence. It is also not denied by them that there are certain ideals which have inspired mankind through the corridor of centuries and that there are certain objectives and desiderata for which men have struggled and made sacrifices. They are also conscious of the noble impulses yearning for a better order of things, of longings natural in most human hearts, to attain a state free from imperfections where higher values prevail and are accepted: Those who do not subscribe to the said theory regarding natural rights, however, do maintain that rights in order to be justiciable and enforceable must form part of the law or the Constitution, that rights to be effective must receive their sanction and sustenance from the law of the land and that rights which have not been codified or otherwise made a part of the law, cannot be enforced in courts of law nor can those rights override or restrict the scope of the plain-language of the statute or the Constitution.

1458. Willoughby while dealing with the concept of natural rights has observed in Vol. I of *Constitution of the United States*:

> "The so-called 'natural' or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or to extend the written provisions of the Constitution. The utmost that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty." (p. 66)

1459. It would be pertinent while dealing with the natural rights to reproduce the following passage from *Salmond on Jurisprudence*, Twelfth Edition:

> "Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by a rule of morality—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is on interest recognized and protected by a rule of law an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.
>
> · Bentham set the fashion still followed by many of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. 'Natural Law, natural rights', he says, 'are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves...... Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the creatures of natural law; they are a metaphor which derives its origin from another metaphor'. Yet the claim that men have natural rights need not involve us in a theory of natural law. In so far as we accept rules and principles of morality prescribing how men ought to behave, we may speak of there being moral or natural rights and in so far as these rules lay down that men have certain rights, we may speak of moral or natural rights. The fact that such natural or moral rights and duties are not prescribed in black and white like their legal counterparts points to a

distinction between law and morals; it does not entail the complete non-existence of moral rights and duties." (*See* pp. 218-219).

1460. The observations on page 61 of P.W. Peterson's '*Natural Law and Natural Rights*' show that the theory of natural rights which was made so popular by John Locke has since ceased to receive general acceptance. Locke had propounded the theory that the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject (see *Principles of Civil Government Book*, 2 S. 149).

1461. While dealing with natural rights, *Rescoe Pound* states on page 500 of Vol. I of his *Jurisprudence*:

> "Perhaps nothing contributed so much to create and foster hostility to courts and law and constitutions as this conception of the courts as guardians of individual natural rights against the state and against society; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; this theory of constitutions as declaratory of common law principles, which are also natural-law principles, anterior to the state and of superior validity to anactments by the authority of the state; this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies. In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-constitution, beyond the reach of any agency but judicial decision."

1462. I may also in this connection refer to a passage on the inherent and inalienable rights in *A History of American Political Theories* by C. Merriam:

> "By the later thinkers the idea that men possess inherent and inalienable rights of a political or quasi-political character which are independent of the state, has been generally given up. It is held that these natural rights can have no other than an ethical value, and have no proper place in politics. 'There never was, and there never can be,' says Burgess, 'any liberty upon this earth and among human beings, outside of state organization'. In speaking of natural rights, therefore, it is essential to remember that these alleged rights have no political force whatever, unless recognized and enforced by the State. It is asserted by Willoughby that 'natural rights' could not have even a moral value in the supposed 'state of nature'; they would really be equivalent to force and hence have no ethical signifance." (*see* p. 310).

1463. It is then argued on behalf of the petitioners that essential features of the Constitution cannot be changed as a result of amendment. So far as the expression "essential features" means the basic structure or framework of the Constitution, I have already dealt with the question as to whether the power to amend the Constitution would include within itself the power to change the basic structure or framework of the Constitution. Apart from that, all provisions of the Constitution are subject to amendatory process and cannot claim exemption from that process by being described essential features.

1464. Distinction has been made on behalf of the petitioners between a fundamental right and the essence, also described as core, of that fundamental right. It is urged that even though the Parliament in compliance with Article 368 has the right to amend the fundamental right to property, it has no right to abridge or take away the essence of that right. In my opinion, this differentiation between fundamental right and the essence or core of that fundamental right is an over-refinement which is not permissible and cannot stand judicial scrutiny. If there is a power to abridge or take away a fundamental right, the said power cannot be curtailed by invoking the theory that though a fundamental right can be abridged or taken away, the essence or core of that fundamental right cannot be abridged or taken away. The essence or core of a fundamental right must in the nature of things be its integral part and cannot claim a status or protection different from and higher than that of the fundamental right of which it is supposed to be the essence or core. There is also no objective standard to determine as to what is the core of a fundamental right and what distinguishes it from the periphery. The absence of such a standard is bound to introduce uncertainty in a matter of so vital an importance as the amendment of the Constitution. I am, therefore, unable to accept the argument, that even if a fundamental right be held to be amendable, the core or essence of that right should be held to be immune from the amendatory process.

1465. The enforcement of due process clause in Fourteenth Amendment of U.S. Constitution, it is submitted on the petitioners behalf, has not caused much difficulty and has not prevented the U.S. courts from identifying the area wherein that clause operates. This fact, according to the submission, warrants the conclusion that the concept of implied limitation on the power of amendment would also not cause much difficulty in actual working. I find considerable difficulty to accede to the above submission. The scope of due process clause in Fourteenth Amendment and of power of amendment of Constitution in Article 368 is different; the two provisions operate in different areas, they are meant to deal with different subjects and there is no similarity in the object of Fourteenth Amendment and that of Article 368. Any attempt to draw analogy between the two, in my opinion, is far fetched.

1466. It may be mentioned that the Draft Report of the Sub-Committee on Fundamental Rights initially contained Clause 11, according to which "no person shall be deprived of his life, liberty or property without due process of law". It was then pointed out that a vast volume of case law had gathered around the words "due process of law" which were mentioned in the Fifth and the Fourteenth Amendment of the U.S. Constitution. At first those words were regarded only as a limitation on procedure and not on the substance of legislation. Subsequently those words were held to apply to matters of substantive law as well. It was further stated that "in fact, the phrase 'without due process of law' appears to have become synonymous with 'without just cause' the court being the judge of what is 'just cause'; and since the object of most legislation is to promote the public welfare by restraining and regulating individual rights of liberty and property the court can be invited, under this clause, to review almost any law". View was also expressed that Clause 11 as worded might hamper social legislation. Although the members of the Committee felt that there was no case for giving a *carte blanche* to the Government to arrest, except in a grave emergency, any person without 'due process of law', there was considerable support for the view that due process clause might hamper legislation dealing with property and tenancy. A compromise formula was then suggested by Mr. Panikkar and with the support of Mr. Munshi, Dr. Ambedkar and Mr. Rajagopachari the suggestion was adopted that the word "property" should be omitted from the clause. In the meanwhile, Mr. B.N. Rau, during his visit to America had discussion with Justice Frankfurter of the U.S. Supreme Court who expressed the opinion that the power of review implied in the "due process" clause was not only undemocratic (because it gave a few judges the power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary. This view was communicated to the Drafting Committee which replaced the expression "without due process of law" by the expression "except according to procedure established by law". The newly inserted words were borrowed from Article 31 of the Japanese Constitution (see pages 232-235 of the *Framing of India's Constitution: Study by Shiva Rao*). Reference to the proceedings of the Drafting Committee shows that a major factor which weighed for the elimination of the expression "due process of law" was that it had no definite contours. In case the view is now accepted that there are implied limitations on the power of making amendment, the effect would necessarily be to introduce an element of vagueness and indefiniteness in our Constitution which our Constitution-makers were so keen to avoid.

1467. Our attention has been invited to the declaration of human rights in the Charter of the United Nations. It is pointed out that there is similarity between the fundamental rights mentioned in Part III of the Constitution and the human rights in the Charter. According to Article 56 of the Charter, all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. Article 55, inter alia, provides that the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. It is submitted on behalf of the petitioners that if the power of amendment of the Constitution under Article 368 were to include the power to abridge or take away fundamental rights, the amendment might well have the effect of curtailing or doing away with some of the human rights mentioned in the United Nations Charter. In this respect I am of the view that the width and scope of the power of amendment of the Constitution would depend upon the provisions of the Constitution. If the provisions of the Constitution are clear and unambiguous and contain no limitations on the power of amendment, the court would not be justified in grafting limitations on the power of amendment because of an apprehension that the amendment might impinge upon human rights contained in the United Nations Charter. It is only in cases of doubt or ambiguity that the courts would interpret a statute as not to make it inconsistent with the comity of nations or established rules of international law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and international law which results. (*see* Maxwell on *The Interpretation of Statutes*, Twelfth Edition, p. 183). It has been observed on page 185:

> "But if a statute is clearly inconsistent with international law or the comity of nations, it must be so construed, whatever the effect of such a construction may be. There is, for instance, no doubt that a right conferred on an individual by a treaty made with the Crown may be taken from him by act of the legislature."

The above observations apply with greater force to a constitutional provision as such provisions are of a paramount nature. It has already been mentioned above that the provisions of our Constitution regarding the power of making amendment are clear and unambiguous and contain no limitation on that power. I, therefore, am not prepared to accede to the contention that a limitation on the power of amendment should be read because of the declaration of Human Rights in the UN Charter.

1468. I may mention in the above context that it is always open to a State to incorporate in its laws the provisions of an international treaty, agreement or convention. In India the provisions of the Geneva Conventions have been incorporated in the Geneva Conventions Act, 1960 (Act 6 of 1960). According to the Treaties of European Communities, a State on becoming a member of the European Economic Communities (EEC) has to give primacy to the Community law over the national laws. The principle of primacy of Community laws was accepted in six countries of the European communities. Three of them, namely, Netherlands, Luxembourg and Belgium specifically amended their written constitutions to secure, as far as possible, the principle of the primacy of the Community law. The other three, namely, France, Germany and Italy have also constitutional provisions under which it would be possible for the courts in those countries to concede primacy to the Treaties of European Communities, and thus through them secure the primacy of the Community law. Ireland which became a new member of EEC with effect from January 1, 1973 has amended its Constitution by the Third Amendment of the Constitution Bill, 1971. This Bill has been approved in a referendum. The relevant part of the Amendment reads as under:

> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State."

In Britain also, primacy of the European Community law over the domestic law has been recognized by Section 2 of the European Communities Act, 1972. Question is now engaging the attention of constitutional experts as to whether it has become necessary to place limitations on the legislative powers of the British Parliament and whether it is on that account essential to have a written Constitution for the United Kingdom (*see* July, 1972 *Modern Law Review*, p. 375 onwards on the subject of Parliamentary Sovereignty and the Primacy of European Community Law).

1469. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living. There was no constitutional provision for fundamental rights before January 26, 1950 and yet can it be said that there did not exist conditions for dignified way of living for Indians during the period between August 15, 1947 and January 26, 1950. The plea that provisions of the Constitution, including those of Part III, should be given retrospective effect has been rejected by this Court. Article 19 which makes provision for fundamental rights, is not applicable to persons who are not citizens of India. Can it, in view of that, be said that the non-citizens cannot while staying in India lead a dignified life? It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.

1470. It may be mentioned that the provisions of Article 19 show that the framers of the Constitution never intended to treat fundamental rights to be absolute. The fact that reasonable restrictions were carved in those rights clearly negatives the concept of absolute nature of those rights. There is also no absolute standard to determine as to what constitutes a fundamental right. The basis of classification varies from country to country. What is fundamental right in some countries is not so in other countries. On account of the difference between the fundamental rights adopted in one country and those adopted in another country, difficulty was experienced by our Constitution-makers in selecting provisions for inclusion in the chapter on fundamental rights (see in this connection *Constitutional Precedents, III Series on Fundamental Rights* p. 25 published by the Constituent Assembly of India).

1471. Reference has been made on behalf of the petitioners to the Preamble to the Constitution and it is submitted that the Preamble would control the power of amendment. Submission has also been made in the above context that there is no power to amend the Preamble because, according to the submission, Preamble is not a part of the Constitution but "walks before the Constitution". I am unable to accept the contention that the Preamble is not a part of the Constitution. Reference to the debates of the Constituent Assembly shows that there was considerable discussion in the said Assembly on the provisions of the Preamble. A number of amendments were moved and were rejected. A motion was thereafter adopted by the Constituent Assembly that "the Preamble stands part of the Constitution" (see *Constituent Assembly Debates,* Vol. X, pp. 429-456). There is, therefore, positive evidence to establish that the Preamble is a part of the Indian Constitution. In view of the aforesaid positive evidence, no help can be derived from the observations made in respect of other Constitutions on the point as to whether preamble is or is not a part of the Constitution. Apart from that, I find that the observations on pp. 200-201 in *Craies on Statute Law,* Sixth Edition show that the earlier view that preamble of a statute is not part thereof has been discarded and that preamble is as much a part of a statute as its other provisions.

1472. Article 394 of the Constitution shows that the said article as well as Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, 393 came into force at once, i.e. on 26th day of November, 1949 when the Constitution was adopted and enacted and the remaining provisions of the Constitution would come into force on the 26th day of January, 1950 "which day is referred to in this Constitution as the commencement of this Constitution". Article 394 would thus show that except for sixteen articles which were mentioned in that article, the remaining provisions of the Constitution came into force on the 26th day of January, 1950. The words "the remaining provisions", in my opinion, would include the Preamble as well as Part III and Part IV of the Constitution. It may also be mentioned that a proposal was made in the Constituent Assembly by Mr. Santhanam that Preamble should come into force on November 26, 1949 but the said proposal was rejected.

1473. As Preamble is a part of the Constitution, its provisions other than those relating to basic structure or framework, it may well be argued, are as much subject to the amendatory process contained in Article 368 as other parts of the Constitution. Further, if Preamble itself is amendable, its provisions other than those relating to basic structure cannot impose any implied limitations on the power of amendment. The argument that Preamble creates implied limitations on the power of amendment cannot be accepted unless it is shown that the Parliament in compliance with the provisions of Article 368 is debarred from amending the Preamble in so far as it relates to matters other than basic structure and removing the supposed limitations which are said to be created by the Preamble. It is not necessary to further dilate upon this aspect because I am of the view that the principle of construction is that reference can be made to Preamble for purpose of construing when the words of a statute or Constitution are ambiguous and admit of two alternative constructions. The preamble can also be used to shed light on and clarify obscurity in the language of a statutory or constitutional provision. When, however, the language of a section or article is plain and suffers from no ambiguity or obscurity, no gloss can be put on the words of the section or article by invoking the Preamble. As observed by Story on *Constitution*, the Preamble can never be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*; it can never amount by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution, and not substantively to create them (*see* para 462). The office of the Preamble has been stated by the House of Lords in *Attorney-General* v. *H.R. H. Prince Earnest Augustus of Hanover*.[59] In case, Lord Normand said:

> "When there is a Preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The Preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between Preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the Preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail............If they (the enacting words) admit of only one construction, that construction, will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the construtions offered by the parties, the construction which fits the preamble may be preferred."

1474. In the President's reference *In Re*: *The Berubari Union and Exchange of Enclaves*,[60] the matter related to the implementation of the agreement between the Prime Ministers of India and Pakistan regarding the division of Berubari Union and for exchange of Cooch-Behar Enclaves in Pakistan and Pakistan enclaves in India. The contention which was advanced on behalf of the petitioner in that case was that the agreement was void as it ceded part of India's territory, and in this connection, reference was made to the Preamble to the Constitution. Rejecting the contention this Court after referring to the words of Story that preamble to the Constitution is "a key to open the minds of the makers" which may show the general purposes for which they made the several provisions, relied upon the following observations of Willoughby about the Preamble to the American Constitution:

---

[59] 1957 AC 436.
[60] (1960) 3 SCR 250: AIR 1960 SC 845: 1960 SCJ 933.

> "It has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted."

To the above observations this Court added:

> "What is true about the powers is equally true about the prohibitions and limitations."

1475. Apart from what has been stated above about the effect of Preamble on the power of amemdment, let us deal with the provisions of the Preamble itself. After referring to the solemn resolution of the people of India to constitute India into a sovereign democratic republic, the Preamble makes mention of the different objectives which were to be secured to all its citizens.

> These objectives are:
>
> JUSTICE, social, economic, and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all;
>
> FRATERNITY assuring the dignity of the individual and the unity of the Nation.

It would be seen from the above that the first of the objectives mentioned in the Preamble is to secure to all citizens of India Justice, social, economic and political. Article 38 in Part IV relating to the Directive Principles of State Policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

1476. Since the latter half of the eigteenth century when the idea of political equality of individuals gathered force and led to the formation of democratic governments,there has been a great deal of extension of the idea of equality from political to economic and social fields. Wide disparaties in the standard of living of the upper strata and the lower strata as also huge concentration of wealth in the midst of abject poverty are an index of social mal-adjustment and if continued for long, they give rise to mass discontent and a desire on the part of those belonging to the lower strata to radically alter and, if necessary, blow up the social order. As those belonging to the lower strata constitute the bulk of the population, the disparties provide a fertile soil for violent upheavals. The prevention of such upheaval is not merely necessary for the peaceful evolution of society, it is also in the interest of those who belong to the upper strata to ensure that the potential causes for violent upheaval are eliminated. Various remedies have been suggested in this connection and the stress has been laid mainly upon having what is called a welfare state. The modern states have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. For this purpose the state has to deal wi h the problems of social security, economic planning and industrial and agrarian welfare. Quite often in the implementation of these policies, the state is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility. Harold Laski while dealing with this matter has observed in *Encyclopaedia of the Social Sciences*:

> "The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product......so long as there is inequality, it is argued, there cannot be liberty. The historic inevitability of this evolution was seen a century ago by de Tocqueville. It is interesting to compare this insistence that the democratization of political power mean equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather towards the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane." (*see* Vol. IX, p. 445).

1477. I may also refer to another passage on page 99 of *Grammar of Politics* by Harold Laski:

> "The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.
>
> We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured."

1478. A modern state has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the state acquires the power to subordinate the individual rights to the larger interests of society as a step towords social justice. As observed by Roscoe Pound on page 434 of Volume I of *Jurisprudence* under the heading "Limitations on the Use of Property":

> "Today the law is imposing social limitations—limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited."

To quote the words of Friedmann in *Legal Theory*:

> "But modern democracy looks upon the right to property as one

> conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as pre-ordained and untouchable private right." (Fifth Edition, p. 406).

1479. With a view to bring about economic regeneration, the state devises various methods and puts into operation certain socio-economic measures. Some of the methods devised and measures put into operation may impinge upon the property rights of individuals. The courts may sometimes be sceptical about the wisdom behind those methods and measures, but that would be an altogether extraneous consideration in determining the validity of those methods and measures. We need not dilate further upon this aspect because we are only concerned with the impact of the Preamble. In this respect I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the Preamble which stands in the way of abridgement of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the Preamble has laid stress, can only be assured by securing the objective of social, economic and political justice.

1480. Reference has been made on behalf of the petitioners to the Nehru Report in order to show that in the pre-independence days, it was one of the objectives of national leaders to have some kind of charter of human rights. This circumstance, in my opinion, has not much material bearing on the point of controversy before us. Our Constitution-makers did incorporate in Part III of the Constitution certain rights and designated them as fundamental rights. In addition to that, the Constitution-makers put in Part IV of the Constitution certain Directive Principles. Although those Directive Principles were not to be enforceable by any court, Article 37 declared that those principles were nevertheless fundamental in the governance of the country and it should be the duty of the State to apply those principles in making laws. The Directive Principles embody a commitment which was imposed by the Constitution-makers on the State to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in. No occasion has arisen for the amendment of the Directive Principles. Attempts have, however, been made for time to time to amend the fundamental rights in Part III. The question with which we are concerned is whether there is power of amendment under Article 368 so as to take away or abridge the fundamental rights. This question would necessarily have to depend upon the language of Article 368 as well as upon the width and scope of the power of amendment under Article 368 and the consideration of the Nehru Report in this context would be not helpful. If the language of Article 368 warrants a wide power of amendment as may include the power to take away or abridge fundamental rights, the said power cannot be held to be non-existent nor can its ambit be restricted by reference to Nehru Report. The extent to which historical material can be called in aid has been laid down in Maxwell on *Interpretation of Statutes* on pages 47-48 as under:

> "In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a

> statute was intended to alter the law or to leave it exactly where it stood before. But although we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge.........we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act."

The above observations hold equally good when we are construing the provisions of a Constitution. Keeping them in view we can get no material assistance in support of the petitioners contention from the Nehru Report.

1481. Apart from what has been stated above, we find that both before the dawn of independence as well as during the course of dabates of the constituent assembly stress was laid by the leaders of the nation upon the necessity of bringing about economic regeneration and thus ensuring social and economic justice. The Congress Resolution of 1929 on social and economic changes stated that "the great poverty and misery of the Indian people are due, not only to foreign exploitation in India but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities". The resolution passed by the Congress in 1931 recited that in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Objectives Resolution which was moved by Pt. Nehru in the Constituent Assembly on December 13, 1946 and was subsequently passed by the Constituent Assembly mentioned that there would be guaranteed to all the people of India, "justice, social, economic, and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality". It would, therefore, appear that even in the Objectives Resolution the first position was given to justice, social economic and political. Pt. Nehru in the course of one of his speeches, said:

> "The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over."

Granville Austin in his book "*Extracts from the Indian Constitution: Cornerstone of Nation*" after quoting the above words of Pt. Nehru has stated:

> "Two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution would be completed, but the social revolution must go on. Freedom, was not an end in itself, only 'a means to an end', Nehru had said, 'that end being the raising of the people......to higher levels and hence the general advancement of humanity".
>
> The first task of this Assembly (Nehru told the members) is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.

> K. Santhanam, a prominent southern member of the Assembly and editor of a major newspaper, described the situation in terms of three revolutions. The political revolution would end, he wrote, with independence. The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'. The third revolution was an economic one: 'The transition from primitive rural economy to scientific and planned agriculture and industry'. Radhakrishnan (now President of India) believed India must have a 'socio-economic revolution' designed not only to bring about 'the real satisfaction of the fundamental needs of the common man', but to go much deeper and bring about 'a fundamental change in the structure of Indian society'.
>
> On the achievement of this great social change depended India's survival. 'If we cannot solve this problem soon' Nehru warned the Assembly, 'all our paper Constitutions will become useless and purposeless.........'
>
> * * * * *
>
> 'The choice for India' wrote Santhanam, '.........is between rapid evolution and violent revolution.........because the Indian masses cannot and will not wait for a long time to obtain the satisfaction of their minimum needs'.
>
> * * * * *
>
> "What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution and with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired or its needs demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought such was the type of Constitution that Constituent Assembly members created."

Dealing with the Directive Principles, Granville Austin writes:

> "In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves.
>
> * * * *
>
> By establishing these positive obligations of the State, the members of the Constituent Assembly made it the responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'
>
> * * * *
>
> The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the democratic institutions of the Constitution) had assumed economic as well as political control of the country,

> and that Indian capitalists should not inherit the empire of British colonialists."

Pt. Nehru, in the course of his speech in support of the Constitution (First Amendment) Bill, said:

> "And as I said on the last occasion the real difficulty we have to face is a conflict between the dynamic ideas contained in the Directive Principles of Policy and the static position of certain things that are called 'fundamental' whether they relate to property or whether they relate to something else. Both are important undoubtedly. How are you to get over them? A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has past its use."

Again, in the course of his speech in support of the Constitution (Fourth Amendment) Bill, Pt. Nehru said:

> "But, I say, that if that is correct, there is an inherent contradiction in the Constitution between the fundamental rights and the Directive Principles of State Policy. Therefore, again, it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy."

1482. It cannot, therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and poor is a recent phenomenon. On the contrary, the above material shows that this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. The material further indicates, that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental right to property if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles.

1483. So far as the question is concerned as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail. It is apparent from what has been discussed above that the approach of the framers of the Constitution was to subordinate the individual right to property to the social good. Property right has also been changing from time to time. As observed by Harold Laski in *Grammar of Politics*, the historical argument is fallacious if it regards the regime of private property as a simple and unchanging thing. The history of private property is, above all, the record of the most varied limitations upon the use of the powers it implies. Property in slaves was valid in Greece and Rome; it is no longer valid today. Laski in this context has quoted the following words of John Stuart Mill:

> "The idea of property is not some one thing identical throughout history and incapable of alteration......at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point, nor on any other, has the law and custom of a given time and place, a claim to be sterotyped for ever. A proposed reform in laws or customs is not necesarily objectionable because its adoption would imply, not the

adaption of all human affairs to the existing idea of property, to the growth and improvement of human affairs."

1484. The argument that Parliament cannot by amendment enlarge its own powers is untenable. Amendment of the Constitution, in the very nature of things, can result in the conferment of powers on or the enlargement of powers of one of the organs of the state. Likewise, it can result in the taking away or abridgement of the powers which were previously vested in an organ of the state. Indeed nearly every expansion of powers and functions granted to the Union Government would involve consequential contraction of powers and functions in the Government of the States. The same is true of the converse position. There is nothing in the Constitution which prohibits or in any other way prevents the enlargement of powers of Parliament as a result of Constitutional amendment and, in my opinion, such an amendment cannot be held to be impermissible or beyond the purview of Article 368. Indeed, a precedent is afforded by the Irish case of *Jeremish Ryan* (supra) wherein amendment made by the Oirechtas as a result of which it enlarged its powers inasmuch as its power of amending the Constitution without a referendum was increased from eight years to 16 years was held to be valid. Even Kennedy, C. J., who gave a dissenting Judgment did not question the validity of the amendment on the ground that Oirechtas had thereby increased its power. He struck it down on the ground that there was no power to amend the amending clause. No such difficulty arises under our Constitution because of the existence of an express provision. I am also unable to accede to the contention that an amendment of the Constitution as a result of which the President is bound to give his assent to an amendment of the Constitution passed in accordance with the provisions of Article 368 is not valid. Article 368 itself gives, inter alia, the power to amend Article 368 and an amendment of Article 368 which has been brought about in the manner prescribed by that Article would not suffer from any constitutional or legal infirmity. I may mention in this context that an amendment of the U.S. Constitution in accordance with Article V of the U.S. Constitution does not require the assent of the President. The change made by the Twenty-fourth Amendment in the Constitution of India, to which our attention has been invited, has not done away with the assent of the President but has made it obligatory for him to give his assent to the Constitution Amendment Bill after it has been passed in accordance with Article 368. As it is not now open to the President to withhold his assent to a Bill in regard to a constitutional amendment after it has been duly passed, the element of personal discretion of the President disappears altogether. Even apart from that, under our Constitution the position of the President is that of a Constitutional head and the scope for his acting in exercise of his personal discretion is rather small and limited.

1485. Reference was made during the course of arguments to the provisions of Section 6 of the Indian Independence Act, 1947. According to to sub-section (1) of that section, the Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation. Sub-section (6) of the section provided that the power referred to in sub-section(1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion. No help, in my opinion, can be derived from the above provisions because the Constituent Assembly framed and adopted the Constitution not on the basis of any power derived from Section 6 of the Indian Independence Act. On the contrary, the members of the Constituent Assembly framed and adopted the Constitution as the representatives of the people and on behalf of the people of India. This is clear from the opening and concluding words of the Preamble to the Constitution. There is, indeed, no reference to the Indian Independence Act in the Constitution except about its repeal in Article 395 of the Constitution.

1486. Apart from the above, I find that all that sub-section (6) of Section 6 of the Indian Independence Act provided for was that the power referred to in sub-section (1) would extend to the making of laws limiting for the future the powers of the Legislature of the Dominion. The Provisional Parliament acting as the Constituent Assembly actually framed the Constitution which placed limitations on the ordinary legislative power of the future Parliaments by providing that the legislative laws would not contravene the provisions of the Constitution. At the same time, the Constituent Assembly inserted Article 368 in the Constitution which gave power to the two Houses of future Parliaments to amend the Constitution in compliance with the procedure laid down in that article. There is nothing in Section 6 of the Indian Independence Act which stood in the way of the Constituent Assembly against the insertion of an article in the Constitution conferring wide power of amendment, and I find it difficult to restrict the scope of Article 368 because of anything said in Section 6 of the Indian Independence Act.

1487. Argument on behalf of the petitioners that our Constitution represents a compact on the basis of which people joined the Indian Union and accepted the Constitution is wholly misconceived. The part of India other than that comprised in erstwhile Indian States was already one territory on August 15, 1947 when India became free. So for as the erstwhile Indian States were concerned, they acceded to the Indian Union long before the Constitution came into force on January 26, 1950 or was adopted on November 26, 1949. There thus arose no question of any part of India comprising the territory of India joining the Indian Union on the faith of any assurance furnished by the provisions of the Constitution. Some assurances were given to the minorities and in view of that they gave up certain demands. The rights of minorities are now protected in Articles 25 to 30. Apart from the articles relating to protection to the minorities, the various articles contained in Part III of the Constitution are applicable to all citizens. There is nothing to show that the people belonging to different regions would have or indeed could have declined to either join the Indian Union or to remain in the Indian Union but for the incorporation of articles relating to fundamental rights in the Constitution. The Constitution containing fundamental rights was framed by the people of India as a whole speaking through their representatives and if the people of India as a whole acting again through their representatives decide to abridge or taking away some fundamental right like one relating to property, no question of breach of faith or violation of any alleged compact can, in my opinion, arise.

1488. This apart, compact means a bargain or agreement mutually entered into, which necessarily connotes a choice and volition for the party to the compact. Whatever may be the relevance or significance of the concept of compact in the context of the U.S. Constitution where different States joined together to bring into existence the United States of America and where further each one of the States ratified the Constitution after it had been prepared by the Philadelphia Convention, the above concept has plainly no relevance in the context of the Indian Constitution. The whole of India was, as already mentioned, one country long before the Constitution was adopted. There was also no occasion here for the ratification of the Constitution by each State after it had been adopted by the Constituent Assembly.

1489. Reference has been made on behalf of the petitioners to the case of *Mangal Singh & Another* v. *Union of India*,[61] which related to the Punjab Reorganization Act, 1966. This Court while upholding the validity of the Act dealt with Article 4, according to which any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequental provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law)(as Parliament may deem necessary, and observed):

> "Power with which the Parliament is invested by Articles 2 and 3, is power to admit, establish or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and is not power to override the constitutional scheme. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has not effective legislative, executive and judicial organs."

1490. The above passage, in my opinion, does not warrant an interence of an implied limitation on the power of amendment as contended on behalf of the petitioners. This Court dealt in the above passage with the import of the words "supplemental, incidental and consequential provisions" and held that these provisions did not enable the Parliament to override the constitutional scheme. The words "constitutional scheme" had plainly reference to the provisions of the Constitution which dealt with a State, its legislature, judiciary and other matters in Part VI. Once the State of Haryana came into being, it was to have the attributes of State contemplated by the different articles of Part VI in the same way as did the other States. No question arose in that case about limitation on the power of amendment under Article 368 and as such, that case cannot be of any avail to the petitioners.

1491. Learned counsel for the petitioner has invited our attention to the constitutional position specially in the context of civil liberties in Canada. In this respect we find that the opening words of the preamble to the British North America Act, 1867 read as under:

> "Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom:"

Section 91 of the abovementioned act deals with the legislative authority of Parliament of Canada. The opening words of Section 91 are as under:

> "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of the sections it is hereby declared that (notwithstanding anything in this Act) the

---

[61] (1967) 2 SCR 109 : AIR 1967 SC 944 : (1968) 1 SCJ 240.

> exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,——"

There follows a list of different subjects. The first amongst the subjects, which was inserted by British North America Act, 1949, is: "The Amendment from time to time of the Constitution of Canada, except, as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or………………….."

It is not necessary to give the details of other limitations on the power of amendment. Section 92 of the British North America Act enumerates the subjects of exclusive provincial legislation. According to this section, in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated. There then follows a list of subjects, the first amongst which is "The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of the Lieutenant Governor". In view of the fact that amendment of the Constitution is among the subjects of legislation, the only distinction in Canada, it has been said, between ordinary legislation by Parliament and constitutional law is that the former concerns all matters not specially stated as within the ambit of provincial legislation while the latter concerns any fundamental change in the division of rights. Further, although because of the federal character of the State, the Canadian Constitution cannot be called flexible, it is probably the least rigid of any in the modern federal states (see *Modern Political Constitutions* by C.F. Strong).

1492. It appears that at least six different views have been propounded in Canada about the constitutional position of basic liberties. To date, the Supreme Court of Canada has not given Judicial approval to any of these views. Different members of the Court have voiced various opinions on the matter, but all of these fall far short of settling the issue. It should also be noted that the fundamental problem is not whether Parliament or the legislatures may give to the people basic freedoms, but rather which one may interfere with them or take them away (see *Civil Liberties in Canada* by D. A. Schmeiser, p. 13).

1493. An important case which had bearing on the question of civil liberties was the *Alberta Press case.*[62] That case related to the validity of an Act which had placed limitations on the freedom of the press and the Supreme Court of Canada held that the Act was ultra vires, since it was ancillary to and dependent upon the Alberta Social Credit Act, which itself was ultra vires. Three of Judges, including Duff, C. J., went further than this, and dealt with the freedom of speech and freedom of Press. It was observed that curtailment of the exercise of the right of the public discussion would interfere with the working of Parliamentary institutions of Canada. Opinion of Duff, C. J., was based not on the criminal law power but on the necessity for maintaining democratic society as contemplated by the Constitution. A later decision dealing with free speech was *Switzmend* v. *Elbing and Attorney-General of Quebec.*[63] In that case the Supreme Court declared invalid the Quebec Communistic Propaganda Act. All the judges but one were agreed that the statute did not fall within provincial competence under property and civil rights or matters of a merely local or private nature in the province. Abbot, J., held that the Parliament itself could not abrogate the right of discussion and debate.

[62] 1938 SCR 100 (Canada).

[63] 1957 SCR 285 (Canada).

1494. An article by Dale Gibson in Volume 12—1966-67 in *McGill Law Journal* shows that though the proposition enunciated by Duff, C. J., has commanded the allegiance of an impressive number of judges and has not been decisively rejected, it has never been accepted by a majority of the members of the Supreme Court of Canada or of any other court. Some judges have assumed that basic freedoms may properly be the subject-matter of legislation separate and apart from any other subject-matter. Others have taken the view that unlimited jurisdiction falls within Dominion control under its general power to make laws "for the peace, order and good government of Canada". A third view which has been taken is that the creation of a Parliament and reference in the Preamble to "a Constitution similar in principle to that of the United Kingdom" postulates that legislative body would be elected and function in an atmosphere of free speech. It is not necessary to give the other views or dialate upon different views. Bora Laskin while dealing with the dictum of Abbott, J., has observed in *Canadian Constitutional Law*:

> "Apart from the dictum by Abbott, J., in the *Switzman case* (supra) there is no high authority which places civil liberties beyond the legislative reach of both Parliament and the provincial Legislatures. There are no explicit guarantees of civil liberties in the B. N. A. Act—nothing comparable to the Bill of Rights (the first ten amendments) in the Constitution of the United States, which, within limits and on conditions prescribed by the Supreme Court as ultimate expounder of the meaning and range of the Constitution, prohibits both federal and State action infringing, inter alia, freedom of religion, of speech, of the press and of assembly". (*See* p. 970).

1495. It would appear from the above that the different views which have been expressed in Canada are in the context of the preamble and sections of the British North America Act, the provisions of which are materially different from our Constitution. Even in the context of the British North America Act, the observations of Abbott, J., relied upon on behalf of the petitioners have not been accepted by the majority of the Judges of the Canadian Supreme Court, and in my opinion, they afford a fragile basis for building a theory of implied limitations.

1496. It may be mentioned that in August, 1960, the Parliament of Canada passed the Canadian Bill of Rights. Section 1 of the Bill declared certain human rights and fundamental freedoms and reads as under:

> "1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely—
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (*b*) the right of the individual to equality before the law and the protection of the law;
>
> (*c*) freedom of religion;
>
> (*d*) freedom of speech;
>
> (*e*) freedom of assembly and association; and
>
> (*f*) freedom of the press."

According to Section 2 of the Bill, every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms therein recognized and declared. The relevant part of Section 2 reads as under:

> "Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognised and declared, and in particular, no law of Canada shall be construed or applied so as to......" (underlining supplied).

Plain reading of Section 2 reproduced above makes it manifest that the human rights and fundamental freedoms mentioned in Section 1 of the Bill are not absolute but are subject to abrogation or abridgment, if an express declaration to that effect be made in law of Canada. Section 2 of the bill shows that if an express declaration to that effect be made an Act of the Parliament can override the provisions of the Bill of Rights. Section 2 is thus inconsistent with the theory of implied limitations based on human rights on the power of the Canadian Parliament.

1498. Another case from Canada which has been referred to on behalf of the petitioners and which in my opinion is equally of no avail to them is *The Attorney-General of Nova Scotia and The Attorney-General of Canada*[64] decided by the Supreme Court of Canada. It was held in that case that an Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa, if enacted, would not be constitutionally valid since it contemplated delegation by Parliament of powers, exclusively vested in it by Section 91 of the British North America Act, to the Legislature of Nova Scotia; and delegation by that Legislature of powers, exclusively vested in Provincial Legislature under Section 92 of the Act, to Parliament. The Parliament of Canada and each Provincial Legislature, according to the Supreme Court of Canada, was sovereign body within its sphere, possessed of exclusive jurisdiction to legislate with regard to the subject-matters assigned to it under Section 91 or Section 92, as the case may be. Neither was capable, therefore, of delegating to the other the powers with which it had been vested nor of receiving from the other the powers with which the other had been vested. It is plain that that case related to the delegation of powers which under the British North America Act had been assigned exclusively to Parliament or to the Provincial Legislatures. Such a delegation was held to be not permissible. No such question arises in the present case.

1499. We may now deal with some of the other cases which have been referred to on behalf of the petitioner. Two of those cases are from Ceylon. The constitutional position there was that Section 29 of the Ceylon (Constitution) Order in Council, 1946 gave the power to make laws as well as the power to amend the Constitution though the procedure prescribed for the two was different. Section 29 reads as under:

> "29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

---

[64] 1950 SCR 31 (Canada).

(2) No such law shall—

(*a*) prohibit or restrict the free exercise of any religion; or

(*b*) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(*c*) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(*d*) alter the Constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:

Provided, however, that the preceding provisions of this subsection shall not apply to any law-making provision for, relating to, or connected with, the election of Members of the House of Representatives, to represent persons registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act.

This proviso shall cease to have effect on a date to be fixed by the Governor-General by Proclamation published in the Gazette.

(3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

1500. In *Liyanage and Others* v. *The Queen*[65] the appellants had been charged with offences arising out of an abortive coup d'etat on January 27, 1962. The story of the coup d'etat was set out in a White Paper issued by the Ceylon Government. On March 16, 1962 the Criminal Law (Special Provisions) Act was passed and it was given retrospective effect from January 1, 1962. The Act was limited in operation to those who were accused of offences against the State in or about January 27, 1962. The Act legalised the imprisonment of the appellants while they were awaiting trial, and modified a section of the penal code so as to enact ex post facto a new offence to meet the circumstances of the abortive coup. The Act empowered the Minister of Justice to nominate the three judges to try the appellants without a jury. The validity of the Act was challenged as well as the nomination which had been made by the Minister of Justice of the three judges. The Ceylon Supreme Court upheld the objection about the vires of some of the provisions of the Act as well as the nomination of the judges.

[65] 1966 All ER 650.

Subsequently the Act was amended and the power of nomination of the judges was conferred on the Chief Justice. The appellants having been convicted at the trial before a court of three judges nominated under the amended Act, went up in appeal before the Judicial Committee. The conviction of the appellants was challenged on three grounds but the Judicial Committee dealt with only two grounds. The first ground was that the Ceylon Parliament was limited by an inability to pass legislation which was contrary to fundamental principles of justice. The two Acts of 1962, it was stated, were contrary to such principles in that they were not only directed against individuals but also ex post facto created crimes and for which those individuals would otherwise be protected the second contention was that the Acts of 1962 offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which was outside the legislature's competence and was inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution ordained. Dealing with the first contention, the Judicial Committee referred to the provisions of the Ceylon (Constitution) Order in Council, 1946 and the Ceylon Independence Act, 1947 and observed that the joint effect of the said Order and Act was intended to and resulted in giving the Ceylon Parliament the full legislative powers of an independent sovereign state. The legislative power of the Ceylon Parliament, it was held, was not limited by inability to pass laws which offended fundamental principles of justice. On the second ground, the Judicial Committee held the Acts of 1962 to be invalid as they involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon, which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from a political, legislative and executive control.

1501. It would thus appear that the decisions it based upon the ground of severance of powers between legislature, judiciary and executive under the Ceylon Constitution and furnishes no support for the theory of implied limitations on the power of Parliament. On the contrary, the Judicial Committee while dealing with the first contention rejected the theory of limitations on the power of Parliament to make a law in violation of the fundamental principles of justice. The Judicial Committee, it is also noteworthy, expressly pointed out that there had been no amendment of the Constitution in accordance with Section 29(4) of the Constitution by two-thirds majority and as such they had not to deal with that situation.

1502. Another case to which reference was made on behalf of the petitioners was *The Bribery Commissioner* v. *Pedrick Ranasinghe*.[66] In that case it was found that the members of the Bribery Tribunal had been appointed by the Governor-General on the advice of the Minister of Justice in accordance with Bribery Amendment Act but in contravention of Section 55 of the Ceylon Constitution [Ceylon (Constitution) Order in Council, 1946] according to which the appointment of judicial officers was vested in the Judicial Service Commission. It was held that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is that of Ceylon.

[66] 1965 AC 172.

1503. It would appear from the above that the point of controversy which arose for determination in that case was different from that which arises in the present case because we are not in this case concerned with any law made by a legislature in contravention of the constitutional provisions. Reference has been made on behalf of the petitioners to a passage in the judgment wherein while dealing with sub-section (2) of Section 29 of the Ceylon Constitution, the provisions of which have been reproduced earlier, the Judicial Committee observed that the various clauses of sub-section (2) set out entrenched religious and racial matters which shall not be the subject of legislation. It was further observed that those provisions represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution, and these are therefore unalterable under the Constitution. It is contended that those observations show that the rights mentioned in Section 29(2) of the Ceylon Constitution which were similar to the fundamental rights in Part III of the Indian Constitution, were held by the Judicial Committee to be unalterable under the Constitution. There was, it is further submitted, similarity between the provisions of Section 29(3) of the Ceylon Constitution and Article 13(2) of the Indian Constitution because it was provided in Section 29(3) that any law made in contravention of Section 29(2) shall to the extent of such contravention be void.

1504. I find it difficult to accede to the contention that the Judicial Committee laid down in the above case that Section 29(2) and 29(3) placed a restriction on the power of amendment of the Constitution under Section 29(4) of the Constitution. The question with which the Judicial Committee was concerned was regarding the validity of the appointment of the members of the Bribery Tribunal. Such appointment though made in compliance with the provisions of the Bribery Amendment Act, was in contravention of the requirements of Section 55 of the Ceylon Constitution. No question arose in that case relating to the validity of a constitutional amendment brought about in compliance with Section 29(4) of the Constitution. Reference to the argument of the counsel for the respondent on top of page 187 of that case shows that it was conceded on his behalf that "there is no limitation at the moment on the right of amendment or repeal except the requirement of the requisite majority". The Judicial Committee nowhere stated that they did not agree with the above stand of the counsel for the respondent. Perusal of the judgment shows that the Judicial Committee dealt with Sections 18 and 29 together and pointed out the difference between a legislative law, which was required to be passed by a majority of votes under Section 18 of the Constitution, and a law relating to a constitutional amendment which was required to be passed by a two-thirds majority under Section 29(4). Dealing with the question of sovereignty, the Judicial Committee observed:

> "A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign power of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority."

It has been submitted on behalf of the respondents that the above passage indicates that the Judicial Committee took the view that the amendment of all the provisions of the Ceylon Constitution including those contained in sub-sections (2) and (3) of Section 29 could be passed by a two-thirds majority. It is also stated that the restrictions imposed by sub-section (2) of Section 29 of the Ceylon Constitution are on the power of ordinary legislation by simple majority and not on the power of making Constitutional amendment by two-thirds majority in compliance with Section 29(4) of the Constitution. It was in that sense that the Judicial Committee, according to the submission, used the word "entrenched". Our attention has also been invited to the observations on Pages 83 and 84 of the Constitutional structure by K.C. Wheare 1963 Reprint that "these safeguards (contained in Section 29) of the rights communities and religions could be repealed or amended by the Parliament of Ceylon provided it followed the prescribed procedure for amendment of the Constitution". These submissions may not be bereft of force, but it is, in my opinion, not necessary to dilate further upon this matter and discuss the provisions of the Ceylon Constitution at greater length. The point of controversy before us would have to be decided in the light essentially of the provisions of our own Constitution. Suffice it to say that *Ranasinghe case* (supra) does not furnish any material assistance to the stand taken on behalf of the petitioners.

1505. We may now advert to the case of *McCawley v. The King*.[67] The said case related to the Constitution of Queensland in Australia. Queensland was granted a Constitution in 1859 by an Order in Council made on June 6. The Order in Council set up a Legislature in the territory consisting of the Queen, a Legislative Council and a Legislative Assembly and the law-making power was vested in the Queen acting with the advice and consent of the Council and Assembly. Any law could be made for the "peace, welfare and good government to the colony" the phrase generally employed to denote the plenitude of sovereign legislative power even though that power be confined to certain subjects or within certain reservations. The Legislature passed a Constitution Act in 1867. By Section 2 of that Act the legislative body was declared to have power to make laws for the peace, welfare and good government of the colony in all cases whatsoever. The only express restriction on this comprehensive power was in Section 9 which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the Constitution of the Council. In 1916 the Industrial Arbitration Act was passed. The said Act authorised the Governor in Council to appoint the President or a judge of the Court of Industrial Arbitration to be a judge of the Supreme Court of Queensland. It was also provided that the judge so appointed shall have the jurisdiction of both offices, and shall hold office as a judge of the Supreme Court during good behaviour. The Governor in Council, by a commission, appointed the appellant who was the President of the Court of Industrial Arbitration to be a judge of the Supreme Court during good behaviour. The Supreme Court of Queensland held that the appellant was not entitled to have the oath of office administered to him or to take his seat as a member of the Supreme Court. Subsequently, the Supreme Court of Queensland gave a judgment in ouster against the appellant. The provisions of Section 6 of the Industrial Arbitration Act of 1916 under which the appellant had been appointed a judge of the Supreme Court were held to be inconsistent with the provisions of the Constitution Act and as such void. On appeal four out of the seven judges of the High Court of Australia agreed with the Supreme Court of

---

[67] 1920 AC 691.

Queensland, while the three other judges took the opposite view and expressed the opinion that the appeal should be allowed. The matter was then taken up in appeal to the Privy Council. Lord Birkenhead giving the opinion of the Judical Commitee held: (1) that the Legislature of Queensland had power, both under the Colonial Laws Validity Act, 1865, and apart therefrom, to authorise the appointment of a judge of the Supreme Court for a limited period; and (2) that Section 6 of the Industrial Arbitration Act authorised an appointment as a judge of the Supreme Court only for the period during which the person appointed was a judge of the Court of Industrial Arbitration. The appellant was futher held to have been validly appointed. The above case though containing observations that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law, laid down the proposition that in the absence of a restriction, it is not possible to impose a restriction upon the legislative power, it was observed:

> "The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

It was also observed:

> "Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section: 'This section is fundamental or organic; it can only be altered in such and such manner'; and of another: 'This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision'."

The decision in the above cited case can hardly afford any assistance to the petitioners. On the contrary, there are passages in the judgment which go against the stand taken on behalf of the petitioners.

1506. Section 5 of the Colonial Laws Validity Act, 1865 to which there was a reference in the *McCawley's case* (supra) reads as under:

> "Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the Constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in Council, or colonial law for the time being in force in the said colony."

Reference has been made during arguments to the decision of the Privy Council in the case of *Attorney-General for New South Wales* v. *Trethowan.*[68] The said case related to a Bill passed by the New South Wales Parliament for repeal of a section providing for referendum as well as to another Bill for abolition of the Legislative Council. The Privy Council affirmed the decision of the Australian High Court which had held by majority that the Bills had

[68] 1932 AC 526.

not been passed in the "manner and form" within the meaning of Section 5 of the Colonial Laws Validity Act, and as such could not be presented for Royal assent. The Privy Council based its decision upon the language of the above section and the meaning of the word "passed" in that section. We are not concerned in the present case with the aforesaid provisions. There is also nothing in the conclusions at which I have arrived which runs counter to the principles laid down in the *Trethowan's case* (supra).

1507. Another Australian case to which reference has been made during the course of arguments is *The State of Victoria* v. *The Commonwealth*.[69] It has been laid down by the High Court of Australia in that case that the Commonwealth Parliament in exercise of its powers under Section 51(*ii*) of the Constitution may include the Crown in right of a State in the operation of a law imposing a tax or providing for the assessment of a tax. The inclusion of the Crown in the right of a State, according to the court, in the definition of "employer" in the pay-roll Tax Assessment Act, thus making the Crown in right of a State liable to pay the tax in respect of wages paid to employees, including employees of the departments engaged in strictly governmental functions, is a valid exercise of the power of the Commonwealth under the above provisions of the Constitution. There was discussion in the course of the judgment on the subject of implied limitation on the Commonwealth legislative power under the Constitution and different views were expressed. Three of Judges, including Barwick, C. J., took the view that there was no such limitation. As against that, four Judges were of the opinion that there was an implied limitation on Commonwealth legislative power under the Constitution but the impugned Act did not offend such limitation, opinion was expressed that the Commonwealth Parliament while acting under the legislative entry of taxation could not so use the power of taxation as to destroy the States in a federal structure. The question as to what is the scope of the power of amendment was not considered in that case. The above case as such cannot be of much assistance for determining as to whether there are any implied limitations on the power to make constitutional amendment.

1508. I am, therefore, of the opinion that the majority view in the *Golak Nath's case* (supra) that Parliament did not have the power to amend any of the power to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights cannot be accepted to be correct. Fundamental rights contained in Part III of our Constitution can, in my opinon, be abridged or taken away in compliance with the procedure prescribed by Article 363, as long the basic structure of the Constitution remains unaffected.

1509. We may now deal with the Twenty-fourth Amendment. It has sought to make clear matters regarding which doubt had arisen and conflcting views had been expressed by this Court. We may in this context set forth the statement of Objects and Reasons of the Constitution (Twenty-fourth Amendment) Bill. The statement of Objects and Reasons reads as under:

STATEMENT OF OBJECTS AND REASONS

> "The Supreme Court in the well-known *Golak Nath's case*, [(1967) 2 SCR 762] reversed, by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. The result of the judgment is that Parliament is considered to have no power

---

[69] 45 **Australian Law Journal Reports 251.**

to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the preamble to the Constitution. It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.

(2) The Bill seeks to amend Article 368 suitably for the purpose and make it clear that Article 368 provides for amendment of the Constitution as well as procedure therefor. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent thereto. The Bill also seeks to amend Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368."

1510. Section 2 of the Bill which was ultimately passed as the Constitution (Twenty-fourth Amendment) Act has added a clause in Article 13 that nothing in that article would apply to any amendment of the Constitution made under Article 368. As a result of Section 3 of the Amendment Act, Article 368 has been re-numbered as clause (2) thereof and the marginal heading now reads "power of Parliament to amend the Constitution and procedure therefor". Non-obstante clause (1) has been inserted in the article to emphasise the fact that the power exercised under that article is constituent power, not subject to the other provisions of the Constitution, and embraces within itself addition, variation and repeal of any provision of the Constitution. Amendment has also been made so as to make it obligatory for the President to give his assent to the Amendment Bill after it has been passed in accordance with the article. Clause (3) has further been added in Article 368 to the effect that nothing in Article 13 would apply to an amendment made under Article 368. Although considerable arguments have been addressed before us on the point as to whether the power of amendment under Article 368 includes the power to amend Part III so as to take away or abridge fundamental rights, it has not been disputed before us that the Constitution (Twenty-fourth Amendment) Act was passed in accordance with the procedure laid down in Article 368 of the Constitution as it existed before the passing of the said Act. In view of what has been discussed above at length, I find no infirmity in the Constitution (Twenty-fourth Amendment) Act, I, therefore, uphold the validity of the said Act.

1511. We may now deal with the Constitution (Twenty-fifth Amendment) Act, 1971. The Twenty-fifth Amendment has made three material changes :

(*i*) It has amended Article 31(2) in two respects :

(*a*) It substitutes the word "amount" for the word "compensation" for property acquired or requisitioned.

(*b*) It has provided that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" is to be given otherwise than in cash.

(*ii*) It has provided that the fundamental right to acquire, hold and dispose of property under Article 19(1)(*f*) cannot be invoked in respect of any such law as is referred to in Article 31(2).

(*iii*) It has inserted Article 31-C as an overriding Article which makes the fundamental rights conferred by Articles 14, 19 and 31 in-applicable to certain categories of laws passed by the Parliament or by any State Legislature.

So far as the substitution of the word "amount" for the word "compensation" for property acquired or requisitioned in Article 31(2) is concerned, we find that this Court held in *Mrs. Bela Banerjee case*[70] that by the guarantee of the right to compensation for compulsory acquisition under Article 31(2), before it was amended by the Constitution (Fourth Amendment) Act, the owner was entitled to receive a "just equivalent" or "full indemnification". In *P. Vajravelu Mudaliar's case*[71] this Court held that notwithstanding the amendment of Article 31(2) by the Constitution (Fourth Amendment) Act and even after the addition of the words "and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate", the expression "compensation" continued to have the the same meaning as it had in Article 31(2) before it was amended, *viz* , just equivalent or full indemnification. Somewhat different view was taken by this Court thereafter, in the case of *Shantitlal Mangaldas.*[72] In the case of *P. Vajravelu Mudaliar* (supra) it was observed that the Constitutional guarantee was satisfied only if a just equivalent of the property was given to the owner. In the case of *Shantilal Mangaldas case* (supra) it was held that "compensation" being itself incapable of any precise determination, no definite connotation could be attached thereto by calling it "just equivalent" or "full indemnification", and under Acts enacted after the amendment of Article 31(2) it is not open to the Court to call in question the law providing for compensation the ground that it is inadequate, whether the amount of compensation is fixed by the law or is to be determined according to principles specified therein (*see* observation of Shah, J., on page 596 (p. 303 of SCC in the case of *R. C. Cooper* v. *Union of India.*[73]) After further discussion of the views p. 598 (p. 304 of SCC) expressed in those two cases, Shah, J., speaking for the majority observed:

> "Both the lines of thought which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge if it is relevant to the determination of compensation and is a recognized principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *P. Vajravelu Mudaliar's case* (supra) or in *Shantilal Mangaldas's case* (supra) the Act, in our judgment, is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles."

1512. The amendment in Article 31(2) made by the Twenty-fifth Amendment by substituting the word "amount" for the word "compensation" is necessarily intended to get over the difficuly caused by the use of the word "compensation". As the said word was held by this Court to have a particular connotation and was constsued to mean just equivalent or full indemnification, the amendment has replaced that word by the word "amount". In substituting the word "amount" for "compensation" the Amendment has sought to ensure that the amount determined for acquisition or requisition of property need not be just equivalent or full indemnification

---

70. 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.
71. (1965) 1 SCR 614 : AIR 1965 SC 1017: (1964) 2 SCJ 703.
72. (1969) 3 SCR 341 : (1969) 1 SCC 509.
73. (1970) 3 SCR 530 : (1970) 1 SCC 248.

and may be, if the legislature so chooses, plainly inadequate. It is not necessary to further dilate upon this aspect because whatever may be the connotation of the word "amount", it would not affect the validity of the amendment made in Article 31(2).

1513. Another change made in Article 31(2) is that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" fixed or determined for the acquisition or requisition of the property is to be given otherwise than in cash. I have not been able to find any infirmity in the above changes made in Article 31(2).

1514. According to clause (2-B) which has been added as a result of the Twenty-fifth Amendment in Article 31, nothing in sub-clause (*f*) of clause (1) of Article 19, shall affect any such law as is referred to in clause (2). In this connection we find that this Court held in some cases that Articles 19(1)(*f*) and 31(2) were exclusive. In ***A.K. Gopalan*** v. ***The State of Madras***[74] a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantees under Articles 19, 21 and 22 of the Constitution. The majority of this Court (Kania, C. J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(*d*) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than according to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its effect upon the guarantee of the fundamental freedom. and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive—each article enacting a code relating to protection of distinct rights [see p. 571 in the case of ***R. C. Cooper***, (supra).] The view expressed in ***Gopalan's case*** (supra) was reaffirmed in ***Ram Singh and Others*** v. ***The State of Delhi.***[74a] The principle underlying the judgment of the majority was extended to the protection of the right to property and it was held that Article 19(1)(*f*) and Article 31(2) were mutually exclusive in their operation. In the case of ***State of Bombay*** v. ***Bhanji Munji & Another***[75] this Court held that Article 19(1)(*f*) read with clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose it of. In ***Kavalappara Kattarathil Kochunis case***[76] Subba Rao, J., delivering the judgement of the majority of the Court, observed that clause (2) of Article 31 alone deals with compulsory acquisition of property by the State for a public purpose, and not Article 31(1) and he proceeded to hold that the expression "authority of law" means authority of a valid law, and on that account validity of the law seeking to deprive a person of his property is open to challenge on the ground that it infringes other fundamental rights, *e. g.* under Article 19(1)(*f*). It was also observed that after the Constitution (Fourth Amendment) Act, 1955 *Bhanji Munji's case* (supra) "no longer holds the field". After the decision in *K. K. Kochuni's case* (supra) there arose two divergent lines of authority. According to one view, "authority of law" in Article 31(1) was liable to be tested on the ground that it violated other fundamental rights and freedoms, including the right to hold property guaranteed by Article 19(1)(*f*). The other view was that "authority of a law" within the meaning of Article 31(2) was not liable to be tested on the ground that it impaired the guarantee of Article 19(1)(*f*) in so far as it imposed substantive restrictions—though it may be tested on the ground of impairment of other guarantees.

---

[74] 1950 SCR 88 : AIR 1950 SC 27: (P. 284-85 of SCC).

[74-a] 1951 SCR 451 : AIR 1951 SC 270: 1951 SCJ 374: 52 Cri LJ 904.

[75] (1955) 1 SCR 777 : AIR 1955 SC 41: 1955 SCJ 10.

[76] (1960) 3 SCR 887 : AIR 1960 SC 1080: (1961) 2 SCJ 443.

In the case of *R. C. Cooper* (supra), Shah, J., speaking for the majority held that in determining the impact of State action upon constitutional guarantees which are fundamental, the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights. It was further observed:

> "We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(*f*) and 31(2) are mutually exclusive."

1515. The Twenty-fifth Amendment seeks to overcome the effect of the above decision in *R.C. Cooper's case* (supra). It has sought to resolve the earlier conflict of views noticeable in this respect in the judgments of this Court. Provision has accordingly been made that the fundamental right to acquire, hold or dispose of property under Article 19(1)(*f*) cannot be invoked in respect of any such law as is referred to in Article 31(2). In view of what has been discussed earlier while dealing with the Twenty-fourth Amendment, the change made by addition of clause (2-B) in Article 31(2) is permissible under Article 368 and cannot be held to be invalid.

1516. We may now deal with Article 31-C, introduced as a result of the Twenty-fifth Amendment. Perusal of this article which has been reproduced in the earlier part of this judgment shows that the article consists of two parts. The first part states that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. According to the second part of this article, no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. There then follows the proviso, according to which where such law is made by the Legislature of a State, the provisions of the article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

1517. The first part of Article 31-C is similar to Article 31-A except in respect of the subject-matter. Article 31-A was inserted by the Constitution (First Amendment) Act, 1951. Clause (1) of Article 31-A as then inserted was in the following words:

> "(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:
>
> Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

Subsequently, clause (1) of Article 31-A was amended by the Constitution (Fourth Amendment) Act, 1955. New clause (1) was in the following words:

> "(1) Notwithstanding anything contained in Article 13, no law providing for—
>
> (*a*) the acquisition by the state of any estate or of any rights therein or the extinguishment or modification of any such rights, or
>
> (*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
>
> (*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
>
> (*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
>
> (*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,
>
> shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:
>
> Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

Clauses (*b*) and (*c*) of Article 39 referred to in Article 31-C read as under:

> "39. The state shall, in particular, direct its policy towards securing—
>
> ……………………
>
> (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
>
> ……………………"

1518. It would appear from the above that while Article 31-A dealt with a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of such rights or other matters mentioned in clauses (*b*) to (*e*) of that article, Article 31-C relates to the securing of the objective that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. But for the difference in subjects, the language of the first clause of Article 31-A and that of the first part of Article 31-C is identical. Both Articles 31-A and 31-C deal with right to property. Article 31-A deals with certain kinds of property and its effect is, broadly speaking, to take those kinds of property from the persons who have rights in the said property. The objective of Article 31-C is to prevent concentration of wealth and means of production and to ensure the distribution of ownership and control of the material resources of the community for the common good. Article 31-C is thus essentially an extension of the principle which was accepted in Article 31-A. The fact that the provisions of Article 31-C are more comprehensive and have greater width compared to those of Article 31-A would not make any material difference. Likewise, the fact that Article 31-A deals with law providing for certain subjects, while Article 31-C deals with law giving effect to the policy towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39, would not detract from the conclusion that Article 31-C is an extension of the principle which was accepted in Article 31-A. Indeed, the legislature in making a law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 acts upon the mandate contained in Article 37, according to which the Directive Principles are fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws. If the amendment of the Constitution by which Article 31-A was inserted was valid, I can see no ground as to how the Twenty-fifth Amendment relating to the insertion of the first part of Article 31-C can be held to be invalid. The validity of the First Amendment which introduced Article 31-A was upheld by this Court as long ago as 1952 in the case of *Sankari Prasad* v. *Union of India* (supra). Article 31-A having been held to be valid during all these years, its validity cannot now be questioned on account of the doctrine of stare decisis. Though the period for which *Sankari Prasad's case* (supra) stood unchallenged was not very long, the effects which have followed in the passing of the State laws on the faith of that decisions as observed by Wanchoo, J., in *Golak Nath's case* (supra) are so overwhelming that we should not disturb the decision in that case upholding the validity of the First Amendment. It cannot be disputed that millions of acres of land have changed hands and millions of new titles in agricultural lands which have been created and the State laws dealing with agricultural land which have been passed in the course of the years after the decision in *Sankari Prasad's case* (supra) have brought about an agrarian revolution. Agricultural population constitutes a vast majority of the population in this country. In these circumstances, it would in my opinion be wrong to hold now that the decision upholding the First Amendment was not correct, and thus disturb all that has been done during these years and create chaos into the lives of millions of our countrymen who have benefited by these laws relating to agrarian reforms. I would, therefore, hold that this is one of the fittest cases in which the principle of stare decisis should be applied. The ground which sustained the validity of clause (1) of Article 31-A, would equally sustain the validity of the first part of Article 31-C. I may in this context refer to the observations of Brandeis, J. in *Lesses* v. *Garnett*,[77] while upholding the validity of the 19th Amendment, according to which the right of citizens of the United States to vote shall not be denied or abridged by the United States or by States on account of sex. This case negatived the contention that a vast addition to the electorate destroyed the social compact and the residuary rights of the States. Justice Brandeis observed:

> "This amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid……has been recognized and acted upon for half a century……The suggestion that the 15th was incorporated in the Constitution not in accordance with law, but practically as a war measure which has been validated by acquiesence cannot be entertained."

1519. We may now deal with the second part of the Article 31-C, according to which no law containing a declaration that it is for giving effect to the policy of State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be called in question in any court on the ground that it does not give effect to such policy. The effect of the second part is that once the declaration contemplated by that article is made, the validity of such a law cannot be called in question in any court on the ground that it is inconsistent with or takes away or abridges any of the right conferred by Articles 14, 19 or 31 of the Constitution. The declaration thus gives a complete protection to the provisions of law containing the declaration from being assailed on the ground of being violative of Articles 14, 19 or 31. However, tenuous the connection of a law with the objective mentioned in clause (*b*) and clause (*c*) of Article 39 may be and however violative it may be of the provisions of Articles 14, 19 and 31 of the Constitution, it cannot be assailed in a court of law on the said ground because of the insertion of the declaration in question in the law. The result is that if an Act contains 100 sections and 95 of them relate to matters not connected with the objectives mentioned in clauses (*b*) and (*c*) of Article 39 but the remaining five sections have some nexus with those objectives and a declaration is granted by the Legislature in respect of the entire Act, the 95 sections which have nothing to do with the objectives of clauses (*b*) and (*c*) of Article 39, would also get protection. It is well-known that State Legislatures are quite often swayed by local and regional considerations. It is not difficult to conceive of laws being made by a state legislature which are directed against citizens of India who hail from other States on the ground that the residents of the State in question are economically backward. For example, a law might be made that as the old residents in the State are economically backword and those who have not resided in the State for more than three generations have an affluent business in the State or have acquired property in the State, they shall be deprived of their business and property with a view to vest the same in the old residents of the State. Such a law if it contains the requisite declaration, would be protected and it would not be permissible to assail it on the ground of being violative of Articles 14, 19 and 31 of the Constitution even though such a law strikes at the integrity and unity of the country. Such a law might also provoke the Legislatures of other States to make laws which may discriminate in the economic sphere against the persons hailing from the State which was the first to enact such discriminatory law. There would thus be a chain reaction of laws which discriminate between the people belonging to different States and which in the very nature of things would have a divisive tendency from a national point of view. The second part of Article 31-C would thus provide the cover for the making of laws with a regional or local bias even though such laws imperil the oneness of the nation and contain the dangerous seeds of national disintegration. The classic words of Justice Holmes have a direct application to a situation like this. Said the great Judge:

---

[77] 258 US 130.

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." [Holmes, *Collected Legal Papers* (1920) 295-96].

The fact that the assent of the President would have to be obtained for such a law might not provide an effective safeguard because occasions can well be visualized when the State concerned might pressurise the Centre and thus secure the assent of the President. Such occasions would be much more frequent when the party in power at the Centre has to depend upon the political support of a regional party which is responsible for the law in question passed by the State Legislature.

1520. It seems that while incorporating the part relating to declaration in Article 31-C, the sinister implications of this part were not taken into account and its repercussions on the unity of the country were not realised. In deciding the question relating to the validity of this part of Article 31-C, we should not, in my opinion, take too legalistic a view. A legalistic judgment would indeed be a poor consolation if it affects the unity of the country. It would be apposite in this context to reproduce a passage from Story's *Commentaries on the Constitution of the United States* wherein he adopted the admonition of Burke with a slight variation as under:

> "The remark of Mr. Burke may, with a very slight change of phrase be addressed as an admonition to all those, who are called upon to frame, or to interpret a Constitution. Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. The business of those, who are called to administer it, is to rule, and not to wrangle. It would be a poor compensation, that one had triumphed in a dispute, whilst we had lost an empire; that we had frittered down a power, and at the same time had destroyed the republic (para 456)."

1521. The evil consequences which would flow from the second part of Article 31-C would not, however, be determinative of the matter. I would therfore examine the matter from a legal angle. In this respect I find that there can be three types of constitutional amendments which may be conceived to give protection to legislative measures and make them immune from judicial scrutiny or attack in court of law.

1522. According to the first type, after a statute has already been enacted by the Legislature a constitutional amendment is made in accordance with Article 368 and the said statute is inserted in the Ninth Schedule under Article 31-B. Such a statute or any of the provisions thereof cannot be struck down in a court of law and cannot be deemed to be void or ever to have become void on the ground that the statute or any provisions thereof is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III. In such a case, the provisions of the entire statute are placed before each House of Parliament. It is open to not less than one-half of the members of each House and not less than two-thirds of the members of each House voting and present after applying their mind to either place the statute in the Ninth Schedule in its entirety or a part thereof or not to do so. It is only if not less than one-half of the total members of each House of Parliament and not less than two-thirds of the members present and voting in each House decide that the provisions of a particular statute should be protected under Article 31-B either in their entirety or partly that the said provisions are inserted in the Ninth Schedule. A constitutional amendment of this type relates to an existing statute of which the provisions can be examined by the two Houses of Parliament and gives protection to the statute from being struck down on the ground of being violative of any provision of Part III of the Constitution. Such an amendment was introduced by the Constitution (First Amendment) Act, 1951 and its validity was upheld in *Sankari Prasad's case* (supra).

1523. The second type of constitutional amendment is that where the constitutional amendment specifies the subject in respect of which a law may be made by the Legislature and the amendment also provides that no law made in respect of that subject shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution. In such a case the law is protected even though it violates the provisions of Part III of the Constitution. It is, however, open in such a case to the court, on being moved by an aggrieved party, to see whether the law has been made for the purpose for which there is constitutional protection. The law is thus subject to judicial review and can be struck down if it is not for the purpose for which protection has been afforded by the constitutional amendment. To this category belong the laws made under Article 31-A of the Constitution which has specified the subject for which law might be made, and gives protection to those laws. It is always open to a party to assail the validity of such a law on the ground that it does not relate to any of the subject mentioned in Article 31-A. It is only if the court finds that the impugned law relates to a subject mentioned in Article 31-A that the protection contemplated by that article would be afforded to the impugned law and not otherwise. Article 31-A was introduced by the Constitution (First Amendment) Act, 1951 and as mentioned earlier, the validity of the First Amendment was upheld in *Sankari Prasad's case* (supra).

1524. The third type of constitutional amendment is one, according to which a law made for a specified object is protected from attack even though it violates Articles 14, 19 and 31. The constitutional amendment further provides that the question as to whether the law is made for the specified object is not justiciable and a declaration for the purpose made by the legislature is sufficient and would preclude the court from going into the question as to whether the law is made for the object prescribed by the constitutional amendment. To such category belongs that part of Twenty-fifth Amendment which inserted Article 31-C when taken alongwith its second part. The law made under Article 31-C is not examined and approved for the purpose of protection by not less than one-half of the members of each House of Parliament and not less than two-thirds of the members present and voting in each House, as is necessary in the case of laws inserted in the Ninth Schedule of the Constitution. Nor can the law made under Article 31-C be subject to judicial review with a view to find out whether the law has, in fact, been made for an object mentioned in Article 31-C. Article 13-C thus departs from the scheme of Article 31-A because while a judicial review is permissible under Article 31-A to find out as to whether a law has been made for any of the objects mentioned in Article 31-A, such a judicial review has been expressly prohibited under Article 31-C. The result is that even if a law made under Article 31-C can be shown in court of law to have been enacted not for the purpose mentioned in Article 31-C but for another purpose, the law would still be protected and cannot be assailed on the ground of being violative of Articles 14, 19 and 31 of the Constitution because of the declaration made by the legislature as contemplated by second part of Article 31-C. It may also be mentioned in this context that such a law can be passed by a bare majority in a legislature even though only the minimum number of members required by the quorum, which is generally one-tenth of the total membership of the legislature, are present at the time the law is passed.

1525. The effect of the above amendment is that even though a law is in substance not in furtherance of the objects mentioned in Article 39(*b*) and (*c*) and has only a slender connection with those objects, the declaration made by the Legislature would stand in the way of a party challenging it on the ground that it is not for the furtherance of those objects. A power is thus being conferred upon the Central and State Legislatures as a result of this provision to make a declaration in respect of any law made by them in violation of the provisions of Articles 14, 19 and 31 and thus give it protection from being assailed on the ground in a Court of law. The result is that even though for the purpose of making an amendment of the Constitution an elaborate procedure is provided in Article 368, power is now given to a simple majority in a State or Central Legislature, in which only the minimum number of members are present to satisfy the requirement of quorum, to make any law in contravention of the Provisions of Articles 14, 19 and 31 and make it immune from attack by inserting a declaration in that law. It is natural for those who pass a law to entertain a desire that it may not be struck down. There would, therefore, be an inclination to make an Act immune from attack by inserting such a declaration even though only one or two provisions of the Act have a connection with the objects mentioned in Article 39(*b*) and (*c*). Articles 14, 19 and 31 can thus be reduced to a dead letter, an ineffective purposeless showpiece in the Constitution.

1526. The power of making an amendment is one of the most important powers which can be conferred under the Constitution. As mentioned earlier, according to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself, while according to Burgess, the amending clause is the most important part of a Constitution. This circumstance accounts for the fact that an elaborate procedure is prescribed for the amending of the Constitution. The power of amendment being of such vital importance can neither be delegated nor can those vested with the authority to amend abdicate that power in favour of another body. Further, once such a power is granted, either directly or in effect, by a constitutional amendment to the State Legislatures, it would be difficult to take away that power, because it can be done only by means of a constitutional amendment and the States would be most reluctant, having got such a power, to part with it. In empowering a State Legislature to make laws violative of Articles 14, 19 and 31 of the Constitution and in further empowering the State Legislature to make laws immune from attack on the ground of being violative of Articles 14, 19 and 31, by inserting the requisite declaration, the authority vested with the power to make amendment under Article 368 (viz., the prescribed majority in each House of Parliament) has, in effect, delegated or granted the power of making amendment in important respects to a State Legislature. Although the objects for which such laws may-be made have been specified, the effect of the latter part of Article 31-C relating to the declaration is that the law in question may relate even to objects which have not been specified. Article 31-C taken along with the second part relating to the declaration departs from the scheme of Article 31-A because while the protection afforded by Article 31-A is to laws made for specified subjects, the immunity granted under Article 31-C can be availed of even by laws which have not been made for the specified objects. The law thus made by the State Legislatures would have the effect of pro tanto amendment of the Constitution. Such a power, as pointed out earlier, can be exercised by the State Legislature by a simple majority in a House wherein the minimum number of members required by the rule of quorum are present.

1527. *In re Initiative and Referendum Act*[78] the Judicial Committee after referring to a previous decision wherein the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to Taverns observed on page 945:

> "But it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."

If it is impermissible for a legislature to create and endow with its own capacity a legislative power not created by the Act to which it owes its own existence, it should, in my opinion, be equally impermissible in the face of Article 368 in its present form under our Constitution, for the amending authority to vest its amending power in another authority like State Legislature. It has to be emphasised in this context that according to Article 368, an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament. The word "only" has a significance and shows that as long as Article 368 exists in its present form, the other methods of amendments are ruled out.

1528. It may be mentioned that apart from the question of legislative competence, the articles for the violation of which statutes have been quashed in overwhelming majority of cases are Articles 14, 19 and 31. The question as to whether the impugned statute is beyond legislative competence can be agitated despite the protection of Article 31-C in the same way as that question can be agitated despite the protection of Article 31-A, but in other respects, as would appear from what has been stated above, Article 31-C goes much beyond the scope of Articles 31-A and 31-B.

1529. In a federal system where the spheres of legislative powers are distributed between the Central Legislature and the State Legislatures, there has to be provided a machinery to decide in case of a dispute as to whether the law made by the State Legislatures encroaches upon the field earmarked for the Central Legislature as also a dispute whether a law made by the Central Legislature deals with a subject which can be exclusively dealt with by the State Legislatures. This is true not only of a federal system but also in a constitutional set up like ours wherein the Constitution-makers, though not strictly adopting the federal system, have imbibed the features of a federal system by distributing and setting apart the spheres of legislation between the Central Legislature and the State Legislatures The machinery for the resolving of disputes as to whether the Central Legislature has trespassed upon the legislative field of the State Legislatures or whether the State Legislatures have encroached upon the legislative domain of the Central Legislature is furnished by the courts and they are vested with the powers of judicial review to determine the validity of the Acts passed by the Legislatures. The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable. As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Dealing with draft Article 25 (corresponding to present Article 32 of the Constitution) by which a right is given to move the Supreme Court for enforcement of the fundamental rights, Dr. Ambedkar speaking in the Constituent Assembly on December 9, 1948 observed:

---

[78] 1919 AC 935.

> "If I was asked to name any particular article in this Constitution as the most important an article without which this Constitution would be a nullity—I could not refer to any other article except this one It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance" (*Constituent Assembly Debates*, Vol VII, p. 953).

Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions. The one sphere where there is no judicial review for finding out whether there has been infraction of the provisions of Part III and there is no power of striking down an Act, regulation or provision even though it may be inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution is that incorporated in Article 31-B taken alongwith the Ninth Schedule. Article 31-B was inserted, as mentioned earlier, by the Constitution (First Amendment) Act. According to Article 31-B, none of the Acts and regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such Act, regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III of the Constitution. The one thing significant to be noted in this connection, however, is that the power under Article 31-B of exclusion of judicial review, which might be undertaken for the purpose of finding whether there has been contravention of any provision of Part III, is exercised not by the legislature enacting the impugned law but by the authority which makes the constitutional amendment under Article 368, viz., the prescribed majority in each House of Parliament. Such a power is exercised in respect of an existing statute of which the provisions can be scrutinized before it is placed in the Ninth Schedule. It is for the prescribed majority in each House to decide whether the particular statute should be placed in the Ninth Schedule, and if so, whether it should be placed there in its entirety or partly. As against that, the position under Article 31-C is that though judicial review has been excluded by the authority making the constitutional amendment, the law in respect of which the judicial review has been excluded is one yet to be passed by the legislatures. Although the object for which such a law can be enacted has been specified in Article 31-C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the courts but in the very legislature which passes the law. The vice of Article 31-C is that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31-A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31-A has also been done away with under Article 31-C The effect of the declaration mentioned in Article 31-C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the objects mentioned in Article 31-C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution. The second part of Article 31-C thus goes beyond the permissible limit of what constitues amendment under Article 368.

1530. It has been argued on behalf of the respondents that the declaration referred to in Article 31-C would not preclude the court from finding whether a law is for giving effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39 and that if an enactment is found by the court to be not for securing the aforesaid objectives, the protection of Article 31-C would not be available for such legislation.

1531. I find it difficult to accede to this contention in view of the language of Article 31-C pertaining to the declaration. The above contention would have certainly carried weight if the second part of the article relating to the declaration were not there. In the absence of the declaration in question, it would be open to, and indeed necessary, for the court to find whether the impugned law is for giving effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39 before it can uphold the validity of the impugned law under Article 31-C, Once, however, a law contains such a declaration, the declaration would stand as bar and it would not be permissible for the court to find whether the impugned law is for giving effect to the policy mentioned in Article 31-C. Article 31-C protects the law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39 and at the same time provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. It is, therefore, manifest that once a law contains the requisite declaration the court would be precluded from going into the question that the law does not give effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39. In view of the conclusive nature of the declaration, it would, in my opinion, be straining the language of Article 31-C to hold that a court can despite the requisite declaration go into the question that it does not give effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39. The result is that if a law contains the declaration contemplated by Article 31-C, it would have complete protection from being challenged on the ground of being violative of Articles 14, 19 and 31 of the Constitution, irrespective of the fact whether the law is or is not for giving effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39. To put it in other words, even those laws which do not give effect to the policy of the State towards securing the principles specified in clause (*b*) or (*c*) of Article 39 would also have the protection if they contain the declaration mentioned in Article 31-C.

1532. I am also of the view that the validity of the latter part of Article 31-C relating to declaration cannot be decided on the basis of any concession made during the course of arguments on behalf of the respondents. Such a concession if not warranted by the language of the impugned provision, cannot be of much avail. Matters relating to construction of an article of the Constitution or the constitutional validity of an impugned provision have to be decided in the light of the relevant provisions and a concession made by the State counsel or the opposite counsel would not absolve the court from determining the matter independently of the concession. A counsel may sometimes make a concession in order to secure favourable verdict on another important point; such a concession would, however, not be binding upon another counsel. It is well-settled that admission or concession made on a point of law by the counsel is not binding upon the party represented by the counsel, far less would such admission or concession preclude other parties from showing that the concession was erroneous and not justified in law. It may, therefore, be laid down as a broad proposition that constitutional matters cannot be disposed of in terms of agreement or compromise between the parties, nor can the decision in such disputes in order to be binding upon others be based upon a concession even though the concession emanates from the State counsel. The concession has to be made good and justified in the light of the relevant provisions.

1533. The position as it emerges is that it is open to the authority amending the Constitution to exclude judicial review regarding the validity of an existing statute. It is likewise open to the said authority to exclude judicial review regarding the validity of a statute which might be enacted by the Legislature in future in respect of a specified subject. In such an event, judicial review is not excluded for finding whether the statute has been enacted in respect of the specified subject. Both the above types of constitutional amendments are permissible under Article 368. What is not permissible, however, is a third type of constitutional amendment, according to which the amending authority not merely excludes judicial review regarding the validity of a statute which might be enacted by the Legislature in future in respect of a specified subject but also excludes judicial review for finding whether the statute enacted by the Legislature is in respect of the subject for which judicial review has been excluded.

1534. In exercising the power of judicial review, it may be mentioned that the courts do not and cannot go into the question of wisdom behind a legislative measure. The policy decisions have essentially to be those of the legislatures. It is for the legislatures to decide as to what laws they should enact and bring on the statute book. The task of the courts is to interpret the laws and to adjudicate about their validity, they neither approve nor disapprove legislative policy. The office of the courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the Constitution. Once the courts have done that, their duty ends. The Courts do not act as superlegislature to suppress what they deem to be unwise legislation for if they were to do so the courts will divert criticism from the legislative door where it belongs and will thus dilute the responsibility of the elected representatives of the people. As was observed by Shri Alladi Krishnaswamy Iyer in speech in the Constituent Assembly on September 12, 1949 "The Legislature may act wisely or unwisely. The principles formulated by the Legislature may commend themselves to a Court or they may not. The province of the Court is normally to administer the law as enacted by the Legislature within the limits of its power."

1535. In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience. Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristrocracy of the Robe, Covert Legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. The sobering reflection has always to be there that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views. As observed by Justice Holmes while dealing with the Fourteenth Amendment to the US Constitution:

> "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." (See *Mr. Justice Holmes*, p. 82-83 (1931 Edition).

It would also be pertinent in this context to reproduce the words of Patanjali Sastri, C. J. in the case of *State of Madras* v. *V. G. Row*[79] while dealing with reasonable restrictions:

> "In evaluating such elusive factors and forming their own concep-

---

[79] 1952 SCR 597: AIR 1952 SC 196: 1952 SCJ 253: 1952 Cri LJ 966.

SCC Online

> tion of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

1535-A. In my opinion, the second part of Article 31-C is liable to be quashed on the following grounds:

> (1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.
>
> (2) The Legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C.

> "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

1536. We may now deal with the Constitution (Twenty-ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries Nos. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act. It may be mentioned that an argument was advanced before us that Articles 31-B and 31-A are linked together and that only those enactments can be placed in the Ninth Schedule as fall within the ambit of Article 31-A. Such a contention was advanced in the case of *N.B. Jeejeebhoy* v. *Assistant Collector, Thana Prant, Thana*.[80] Repelling the contention Subba Rao, J. (as he then was) speaking for the Constitution Bench of this Court observed:

> "The learned Attorney-General contended that Article 31-A and Article 31-B should be read together and that if so read Article 31-B would only illustrate cases that would otherwise fall under Article 31-A and, therefore, the same construction as put upon Article 31-B should also apply to Article 31-A of the Constitution. This construction was

---

[80] (1965) 1 SCR 636 : AIR 1965 SC 1096.

> sought to be based upon the opening words of Article 31-B, namely, 'without prejudice to the generality of the provisions contained in Article 31-A'. We find it difficult to accept this argument. The words 'without prejudice to the generality of the provisions', indicate that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Article 31-A of the Constitution. If every Act in the Ninth Schedule would be covered by Article 31-A, this article would become redundant. Indeed, some of the Acts mentioned therein, namely, items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in Article 31-A(2) of the Constitution. We, therefore, hold that Article 31-B is not governed by Article 31-A and that Article 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution."

I see no cogent ground to take a different view. In the result I uphold the validity of the Constitution (Twenty-ninth Amendment) Act.

1537. I may now sum up my conclusions relating to power of amendment under Article 368 of the Constitution as it existed before the amendment made by the Constitution (Twenty-fourth Amendment) Act as well as about the validity of the Constitution (Twenty-fourth Amendment) Act, the Constitution (Twenty-fifth Amendment) Act and the Constitution (Twenty-ninth Amendment) Act:

(*i*) Article 368 contains not only the procedure for the amendment of the Constitution but also confers the power of amending the Constitution.

(*ii*) Entry 97 in List I of the Seventh Schedule of the Constitution does not cover the subject of amendment of the Constitution.

(*iii*) The word "law" in Article 13(2) does not include amendment of the Constitution. It has reference to ordinary piece of legislation. It would also in view of the definition contained in clause (*a*) of Article 13(3) include an ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

(*iv*) Provision for amendment of the Constitution is made with a view to overcome the difficulties which may be encountered in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of governments. If no provision were made for amendment of the Constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.

(*v*) Argument that Parliament can enact legislation under Entry 97 List I of Seventh Schedule for convening a Constituent Assembly or holding a referendum for the purpose of amendment of Part III of the Constitution so as to take away or abridge fundamental rights is untenable. There is no warrant for the proposition that as the amendments under Article 368 are not brought about through referendum or passed in a convention the power of amendment under Article 368 is on that account subject to limitations.

(*vi*) The possibility that power of amendment may be abused furnishes no ground for denial of its existence. The best safeguard against abuse of power is public opinion and the good sense of the majority of the members of Parliament. It is also not correct to assume that if Parliament is held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of all fundamental rights.

(*vii*) The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

(*viii*) Right to property does not pertain to basic structure or framework of the Constitution.

(*ix*) There are no implied or inherent limitations on the power of amendment apart from those which inhere and are implicit in the word "amendment". The said power can also be not restricted by reference to natural or human rights. Such rights in order to be enforceable in a court of law must become a part of the statute or the Constitution.

(*x*) Apart from the part of the Preamble which relates to the basic structure or framework of the Constitution, the Preamble does not restrict the power of amendment.

(*xi*) The Constitution (Twenty-fourth Amendment) Act does not suffer from any infirmity and as such is valid.

(*xii*) The amendment made in Article 31 by the Constitution (Twenty-fifth Amendment) Act is valid.

(*xiii*) The first part of Article 31-C introduced by the Constitution (Twenty-fifth Amendment) Act is valid. The said part is as under:

> "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(*xiv*) The second part of Article 31-C contains the seed of national disintegration and is invalid on the following two grounds;

(1) It gives a *carte blanche* to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature including a State Legislature, to amend the Constitution in important respects.

(2) The Legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C—

> "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

(*xv*) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid.

1538. The petition shall now be posted for hearing before the Constitution Bench for disposal in the light of our findings.

Mathew, J.— In the cases before us, the Constitution of our country, in its most vital parts has to be considered and an opinion expressed which mav essentially influence the destiny of the country. It is difficult to approach the question without a deep sense of its importance and of the awesome responsibility involved in its resolution.

1540. I enterain little doubt that in important cases it is desirable for the future development of the law that there should be plurality of opinions even if the conclusion reached is the same. There are dangers in their being only one opinion. "Then the statements in it have tended to be treated as definitions and it is not the function of a Court to frame definitions. Some latitude should be left for future developments. The true ratio of a decision generally appears more clearly from a comparison of two or more statements in different words which are intended to supplement each other[4]". In *Cassell & Co. Ltd.* v. *Broome and Another*[5], Lord Chancellor, Lord Hailsham said that Lord Devlin's statement of the law in *Rookes* v. *Barnard*[6], has been misunderstood particularly by his critics and that the view of the House of Lords has suffered to some extent from the fact that its reasons were given in a single speech and that whatever might be the advantages of a judgment delivered by one voice, the result may be an unduly fundamentalist approach to the actual language employed. In *Graves* v. *Newyork*[7], Frankfurter, J., in his concurring judgment,characterized the expression of individual opinions by the justices as a healthy practice rendered impossible only by the increasing volume of the business of the Court.

---

[4] *See* Lord Reid in *Gallie* v. *Lee*, (1970) 3 WLR 1078.

[5] (1972) 1 All ER 801, 821.

[6] (1964) 1 All ER 367.

1541. As the arguments were addressed mainly in Writ Petition No. 135/ 1970, I will deal with it now. In this writ petition the petitioner challenged the validity of the Kerala Land Reforms Amendment Act, 1969, and the Kerala Land Reforms Amendment Act, 1971, for the reason that some of the provisions thereof violated Articles 14, 19(1)(*f*), 25, 26 and 31 of the Constitution.

1542. During the pendency of the Writ Petition, the Amending Body under the Constitution passed three constitutional amendments, namely, the Constitution 24th, 25th and 29th Amendment Acts.

1543. The 24th Amendment made certain changes in Article 368 to make it clear that the Parliament, in the exercise of its constituent power, has competence to amend by way of addition, variation or repeal, any of the provisions of the Constitution in accordance with the procedure laid down in the article and that Article 13(2) would not be a bar to any such amendment. By the 25th Amendment, the word 'amount' was substituted for the word 'compensation' in Clause 2 of Article 31. That was done in order to make it clear that the law for acquisition or requisition of the property need only fix an amount or lay down the principles for determining the amount and not the just equivalent in money of the market value of the property acquired or requisitioned. The Amendment also makes it clear that no such law shall be called in question in any Court on the ground that the whole or any part of such amount is to be given otherwise than in cash. The 29th Amendment put the two Acts in question, viz., the Kerala Land Reforms (Amendment) Act, 1969, and the Kerala Land Reforms (Amendment) Act, 1971, in the Ninth Schedule with a view to make the provisions thereof immune from attack on the ground that the Acts or the provisions thereof violate any of the Fundamental Rights.

1544. The petitioner challenges the validity of these Amendments.

1545. As the validity of the 25th and the 29th Amendments essentially depends upon the validity of the 24th Amendment, it is necessary to consider and decide that question first. I, therefore, turn to the circumstances which necessitated the Constitution 24th Amendment Act.

1546. The Constitution (First Amendment) Act, 1951, was passed by Parliament on June 18, 1951, Sections 2, 3 and 4 of the Act made amendments in some of the articles in Part III of the Constitution. The validity of the Amendment was challenged before this Court in *Sankari Prasad* v. *The Union of India*,[8] and one of the questions which fell for decision was whether, in view of Clause 2 of Article 13, Parliament had power to amend the Fundamental Rights in such a way as to take away or abridge them. And the argument was that the word "State" in Clause 2 of Article 13 includes Parliament and the word 'law' would take in an amendment of the Constitution and, therefore, Parliament had no power to pass a law amending the Constitution in such a way as to take away or abridge the Fundamental Rights. Pantajali Sastri, J., who delivered the judgment of the Court said that although the word 'law' would ordinarily include constitutional law, there is a distinction between ordinary law made in the exercise of legislative power and constitutional law made in the exercise of constituent power and that, in the context of Clause 2 of Article 13, the word 'law' would not include an amendment of the Constitution.

---

[7] 306 US 466.

[8] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

1547. This decision was followed in *Sajjan Singh* v. *State of Rajasthan*.[9] There, Gajendragadkar, C. J., speaking for himself and two of his colleagues, substantially agreed with the reasoning of Pantanjali Sastri, J., in *Sankari Prasad* v. *The Union of India*.[10] Hidayatullah and Mudholkar, JJ., expressed certain doubts as to whether Fundamental Rights could be abridged or taken away by amendment of the Constitution under Article 368.

1548. The question again came up before this Court in *Golaknath* v. *State of Punjab*,[11] hereinafter called '*Golaknath case*' where the validity of the 17th Amendment was challenged on much the same grounds. The majority constituting the Bench decided that Parliament has no power to amend the Fundamental Rights in such a way as to take away or abridge them, but that the 1st, 4th and 17th Amendments were valid for all time on the basis of the doctrine of prospective overruling and that the Acts impugned in the case were protected by the Amendments.

1549. The reasoning of the leading majority (Subba Rao, C. J., and the colleagues who concurred in the judgment pronounced by him) was that Article 368, as it stood then, did not confer the substantive power to amend the provisions of the Constitution but only prescribed the procedure for the same, that the substantive power to amend is in Articles 245, 246 and 248 read with Entry 97 of List I of the Seventh Schedule, that there is no distinction between a law amending the Constitution and an ordinary law passed in the exercise of the legislative power of Parliament and that the word 'law' in Clause 2 of Article 13 would include an amendment of the Constitution.

1550. Hidayatullah, J., who wrote a separate judgment concurring with the conclusion of the leading majority, however, took the view that Article 368 conferred the substantive power to amend the Constitution but that Fundamental Rights cannot be amended under the article so as to take away or abridge them. He said that there is no distinction between constitutional law and ordinary law, that both are laws, that the Constitution limited the powers of the Government but not the sovereignty of the State, that the State can, in the exercise of its supremacy, put a limit on its supremacy, echoing in effect the view that there could be 'auto-limitation' by a sovereign of his own supreme power and that, by Clause 2 of Article 13, the State and all its agencies, including the Amending Body, were prohibited from making any law, including a law amending the Constitution, in such a way as to take away or abridge the Fundamental Rights.

1550-A. Let me first take up the question whether Article 368 as it stood before the 24th Amendment gave power to Parliament to amend the rights conferred by Part III in such a way as to take away or abridge them.

---

[9] (1965)1 SCR 933: AIR 1965 SC 845: (1965)1 SCJ 377.

[10] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

[11] (1967)2 SCR 762: AIR 1967 SC 1643: (1967)2 SCJ 486.

1551. In *Golaknath case*,[12] Hidayatullah, J., said that it is difficult to take a narrow view of the word 'amendment' as including only minor changes within the general framework, that by an amendment, new matter may be added, old matter removed or altered, and that except two dozen articles in Part III, all the provisions of the Constitution could be amended. Wanchoo, J., speaking for the leading minority in that case was of the view that the word 'amendment' in its setting in the article was of the widest amplitude and that any provision of the Constitution could be amended. Bachawat, J., was also inclined to give the widest meaning to the word. Ramaswami, J., did not specifically advert to the point, but it seems clear from the tenor of his judgment that he was also of the same view.

1552. Mr. Palkhivala for the petitioner contended that the word 'amendment' in the article could only mean a change with a view to make improvement; that in the context, the term connoted only power to make such changes as were consistent with the nature and purpose of the Constitution, that the basic structure and essential features of the Constitution cannot be changed by amendment, and that the assumption made by these judges that the word 'amendment' in the article was wide enough to make any change by way of alteration, addition or repeal of any of the provisions of the Constitution was unwaranted. He said that the article was silent as regards the subject-matter in respect of which amendments could be made or the extent and the width thereof, that it was set in a low key as it did not contain the words "amend by way of addition, variation or repeal", that these circumstances should make one pause before ascribing to the word 'amendment' its widest meaning and that, in the context, the word has only a limited meaning.

1553. I do not think that there is any substance in this contention.

1554. In the *Oxford English Dictionary*, the meanings of the word 'amend' are given as—

> "to make professed improvements (in a measure before Parliament); formally to alter in detail, though practically it may be to alter its principle so as to thwart it."

According to "*Standard Dictionary*", Funk and Wagnalls (1894), the meanings of 'amendment' are:

> "The act of changing a fundamental law, as of a political constitution, or any change made in it according to a prescribed mode of procedure; as, to alter the law by amendment; an amendment of the Constitution."

1555. The proviso to Article 368 used the expression 'change' and that would indicate that the term 'amend' really means 'change'. The main part of Aricle 368 thus gave power to amend or to make changes in the Constitution. Normally, a change is made with the object of making an improvement; at any rate, that is the professed object with which an amendment is sought to be made. The fact that the object may not be achieved is beside the point. Amendment contains in it an element of euphemism of conceit in the proposer, an assumption that the proposal is an improvement. Beyond this euphemistic tinge, amendment as applied to alteration of laws according to dictionaries means 'alter' or 'change.[13]'

---

[12] (1967)2 SCR 762: AIR 1967 SC 1643: (1967)2 SCJ 486.

[13] *See* McGovney, Is the Eighteenth Amendment Void because of its Contents?" *Columbia Law Review*, Vol. 20.

1556. In the *National Prohibition Cases*,,[14] it was argued before the United States Supreme Court that an amendment under Article V of the United States Constitution must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic features but this argument was overruled.

1557. In *Ryan' s case*[15], the Supreme Court of Ireland held by a majority that the word 'amendment' occurring in Article 50 of the Irish Constitution was of the widest amplitude. Fitz Gibbon, J., observed after reading the various meanings of the word 'amendment' that the word as it occurred in a Constitution Act must be given its widest meaning. Murnaghan, J., observed that although complete abolition of the Constitution without any substituted provisions might not properly be called in law an 'amendment', the word is wide enough to allow of the repeal of any number of articles of the Constitution, however important they might be. Kennedy, C.J., did not specifically deal with the meaning of the word.

1558. In this context it is relevant to keep in mind the general rules of construction for interpreting a word like 'amendment' occurring in a constituent Act like the Constitution of India.

1559. In *In Re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, etc.*[16] Sir Maurice Gwyer said that a broad and liberal spirit should inspire those whose duty it is to interpret a Constitution, that a Court should avoid a narrow and pedantic approach and that when a power is granted without any restriction, it can be qualified only by some express provision or by the scheme of the instrument.

1560. The basic principles of construction were definitively enunciated by the Privy Council in *The Queen* v. *Burah*,[17] and those principles were accepted and applied by Earl Loreburn in *Attorney-General for Ontario* v. *Attorney-General for Canada*.[18] Lord Selborne said in the former case that the question whether the prescribed limits of a power have been exceeded has to be decided by looking to the terms of the instrument by which, affirmatively, the power was created, and by which, negatively, it is restricted and that if what has been done is within the general scope of the affirmative words which give the power, and if it violates no express condition of restriction by which that power is limited, it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions. In other words, in interpreting a Constitution, as Lord Loreburn said in the latter case, if the text is explicit, the text is conclusive, alike in what it directs and what it prohibits.

1561. I should think that in such matters everything turns upon the spirit in which a judge approaches the question before him. The words he must construe are, generally speaking, mere vessels in which he can pour nearly anything he will. "Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined".[19] And this is why President Roosevelt said that the Judges of the Supreme Court must be not only great Justices, but they must be great constructive statesmen.[20]

---

[14] *Rhode Island* v. *Palmer*, 253 US 360.

[15] *The State* (*At the Prosecution of Jeremiah Ryan and Others*) v. *Captain Michsol Lennon and Others*, (1935) Irish Reports 170.

[16] (1939) FCR 18: AIR 1939 FC 1.

[17] (1878)3 AC 889, 904-905.

[18] 1912 AC 571 at 583.

1562. Therefore, although the word 'amendment' has a variety of meanings, we have to ascribe to it in the article a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and to meet the various crises to which the body politic will be subject. The nature of that instrument demands awareness of certain presupposition. The Constitution has no doubt its roots in the past but was designed primarily for the unknown future. The reach of this consideration was indicated by Justice Holmes in language that remains fresh no matter how often repeated[21]:

> "..............when we are dealing with words that also are a constituent Act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters ...."

1563. Every well-drawn Constitution will therefore provide for its own amendment in such a way as to forestall as is humanly possible all revolutionary upheavels.[22] That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forthwith an intensity that exacts more than reasonable satisfaction.[23] As Wilson said, a living Constitution must be Darwinian in structure and practice.[24] The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment".[25] If the experiment fails, there must be provision for making another. Jefferson said that there is nothing sanctimonious about a Constitution and that nobody should regard it as the ark of the covenant, too sacred to be touched. Nor need we ascribe to men of preceding age, a wisdom more than human and suppose that what they did should be beyond amendment. A Constitution is not an end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. The sentiment expressed by Jefferson in this behalf was echoed by Dr. Ambedkar.[26] If thare is one sure conclusion which I can draw from this speech of Dr. Ambedkar, it is this: He could not have conceived of any limitation upon the amending power. How could he have said that what Jefferson said is "not merely true but absolutely true", unless he subscribed to the view of Jefferson that "each generation is a distinct nation with a right, by the will of the majority to bind themselves but none to bind the succeeding generations more than the inhabitants of another country", and its corollary which follows as 'the night the day' that each generation should have the power to determine the structure of the Constitution under which they live. And how could this be done unless the power of amendment is plenary, for it would be absurd to think that Dr. Ambedkar contemplated a resolution in every generation for changing the Constitution to to suit its needs and aspirations. I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit the power of amendment of the future generation by exercising its power to amend the amending power. Mr Palkhivala said that if the power of amendment of the amending power is plenary, one generation can, by exercising that power, take away the power of amendment of the Constitution from the future generations and foreclose them from ever exercising it. I think the argument is too speculative to be countenanced. It is just like the argument that if men and women are given the freedom to choose their vocations in life, they would all jump into a monastery or a nunnery, as the case may be, and prevent the birth of a new generation; or the argument of some political thinkers that if freedom of speech is allowed to those who do not believe in it, they would themselves deny it to others when they get power and, therefore, they should be denied that freedom today, in order that they might not deny it to others tomorrow.

---

[19] *See* the passage of Learned Hand quoted in *Cases and Materials on the Legal Process* by FKH Maher and others, 2nd ed., p. 498.

[20] *See* the passage quoted by Frederic R. Coudert in 13 *Yale Law Journal*, p. 338.

[21] *Missouri* v. *Holland*, 252, US, 416 433.

[22] *See* Carl, J., Friedrich *Constitutional Government and Democracy*, p. 135.

[23] *See* Felix Frankfrter, *Of Law and Men*, p. 35.

[24] See *Constitutional Government in the United States*, p. 25.

[25] *See* Justice Holmes in *Abrams* v. *United States*, 250 US 616.

[26] *Constituent Assembly Debates*, Vol. X, pp. 296-297.

1564. Seeing, therefore, that it is a "Constitution that we are expounding" and that the Constitution-makers had before them several Constitutions where the word 'amendment' or 'alteration' is used to denote plenary power to change the fundamentals of the Constitution, I cannot approach the construction of the word 'amendment' in Article 368 in a niggardly or pettyfogging spirit and give it a narrow meaning; but "being a familiar expression, it was used in its familiar legal sense".[27]

1565. However, Mr. Palkhivala contended that there are provisions in the Constitution which would militate against giving the word 'amendment' a wide meaning in the article and he referred to the wording in Schedule V, Para 7(1) and Schedule VI, Para 21(1). These paragraphs use along with the word 'amend', the expression "by way of addition, variation or repeal". Counsel said that these words were chosen to indicate the plenitude of the power of amendment and that this is in sharp contrast with the wording of Article 368 where only the word 'amendment' was used. But Schedule V, Para 7(2) and Schedule VI, Para 21(2) themselves indicate that, but for these provisions, an amendment of the schedule by way of addition, variation or repeal would be an amendment of the Constitution under Article 368. In other words, the sub-paragraphs show clearly that the expression "amend by way of addition, variation or repeal" in Para 7(1) of Schedule V and Para 21(1) of Schedule VI has the same content as the word 'amendment' in Article 368.

1566. Reliance was also placed by counsel on Section 291 of the Government of India Act, 1935, as amended by the Third Amendment Act, 1949, which provided that "such amendments as he considers necessary whether by way of addition, modification or repeal in the Act". No inference can be drawn from the use of these words as to the meaning to be assigned to the word 'amendment' in Article 368 or its width as it is well known that draftsmen use different words to indicate the same idea for the purpose of elegance or what is called "the graces of style" or their wish to avoid the same word, or sometimes by the circumstance that the Act has been compiled from different sources and sometimes by alteration and addition from various hands which the Acts undergo in their progress in Parliament.[28]

---

[27] *See* Justice Holmes in *Henry* v. *United States*, 251 US 393, 395.

1567. It was submitted that if the word 'amendment' is given an unlimited amplitude, the entire Constitution could be abrogated or repealed and that certainly could not have been the intention of the makers of the Constitution. The question whether the power of amendment contained in Article 368 as it stood before the amendment went to the extent of completely abrogating the Constitution and substituting it by an entirely new one in its place is not beyond doubt. I think that the power to amend under that article included the power to add any provision to the Constitution, to alter any provision, substitute any other provision in its place and to delete any provision. But when the article said that, on the bill for the amendment of the Constitution receiving the President's assent, "the Constitution shall stand amended", it seems to be fairly clear that a simple repeal or abrogation of the Constitution without substituting anything in the place of the repealed Constitution would be beyond the scope of the amending power, for, if a Constitution were simply repealed, it would not stand amended. An amendment which brings about a radical change in the Constitution like introducing presidential system of Government for cabinet system, or, a monarchy for a republic, would not be an abrogation or repeal of the Constitution. However radical the change might be, after the amendment, there must exist a system by which the State is constituted or organised. As already stated, a simple repeal or abrogation without more, would be contrary to the terms of Article 368 because it would violate the constitutional provision that "the Constitution shall stand amended".

1568. Even if the word 'amendment' in Article 368 as it stood originally was wide enough to empower the amending body to amend any of the provisions of the Constitution, it was submitted by the petitioner, that Article 13(2) was a bar to the amendment of the Fundamental Rights by Parliament in such a way as to take away or abridge them :

> "13(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

In this context it is necessary to understand the basic distinction between a flexible and a rigid Constitution to appreciate the argument that an amendment of the Constitution is 'law' within the purview of the sub-article.

1569. The outstanding characteristic of a flexible Constitution like the British Constitution as contrasted with a rigid one like ours is the unlimited authority of the Parliament to which it applies, to pass any law without any restriction. In a rigid Constitution, there is a limitation upon the power of the Legislature by something outside itself. There is a greater law than the law of the ordinary Legislature and that is the law of the Constitution which is of superior obligation unknown to a flexible Constitution. It does not follow that because a Constitution is written, it is therefore rigid. There can be a written Constitution which is flexible. "The sole criterion of a rigid Constitution is whether the constituent assembly which drew up the Constitution left any special direction as to how it was to be changed".[29] If a special procedure is prescribed by the Constitution for amending it, different from the procedure for passing ordinary law, then the Constitution is rigid.

---

[28] *See* Maxwell on *the Interpretation of Statutes*, 12th ed. p. 286.

1570. It is said that Articles 4 and 169, Paragraph 7 of the Fifth Schedule and Paragraph 21 of the Sixth Schedule show that amendment of the Constitution can be made by the ordinary law-making procedure. These provisions themselves show that the amendment so effected shall not be deemed to be amendment for the purpose of Article 368. This is because the procedure prescribed by them is different from the procedure laid down in Article 368.

1571. Mr. Palkhivala did not contend that the power to amend is located in Articles 245, 246 and 248 read with Entry 97 of List I of the Seventh Schedule. He only submitted that it is immaterial whether the power is located in Articles 245, 246 and 248 read with Entry 97 of List I of the Seventh Schedule or in Article 368. I do not think that there could be any doubt that Article 368 as it stood before the 24th Amendment contained not only the procedure but also the substantive power of amendment. As the article laid down a procedure different from the procedure for passing ordinary laws, our Constitution, is a rigid one and the power to amend a constituent power.

1572. The vital distinction between constitutional law and ordinary law in a rigid Constitution lies in the criterion of the validity of the ordinary law. An ordinary law, when questioned, must be justified by reference to the higher law embodied in the Constitution; but in the case of a Constitution, its validity is, generally speaking, inherent and lies within itself. Kelsen has said, the basic norm (the Constitution) is not created in a legal procedure by a law-creating organ. It is not—as a positive legal norm is—valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because, without this presupposition, no human act could be interpreted legal, especially as a norm-creating act. In other words, the validity of the Constitution generally lies in the social fact of its being accepted by the community and for the reason that its norms have become efficacious. Its validity is meta-legal.[30]

1573. Whether the observations of Kelsen would apply to our Constitution would depend upon the answer to the question whether the legal source of the Constitution should be traced to the Indian Independence Act, 1947, or, whether the Constitution was the result of the exercise of the revolutionary constituent power of the people.

1574. It does not follow from what has been said that there are no basic rules in a flexible Constitution like that of Great Britain. The principle of the English Constitution, namely, that the Court will enforce Acts of Parliament is not derived from any principle of common law, but is itself an ultimate principle of English Constitutional law.[31]

---

[29] *See generally* CF Strong, *Modern Political Constitutions*, (1963), pp. 152-153.

[30] *See* Hans Kelsen, *General Theory of Law and State*" p. 116.

[31] *See* HWR Wade, "*The Basis of Legal Sovereignty*" (*1955*) *Cambridge Law Journal*, 172.

1575. Once it is realised that a Constitution differs from law in that a Constitution is always valid whereas a law is valid only if it is in conformity with the Constitution and that the body which makes the Constitution is a sovereign body and generally needs no legal authority whereas a body which makes the ordinary law is not sovereign, but derives its power from the Constitution, an amendment to the Constitution has the same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable. Just as an ordinary law derives its validity from its conformity with the Constitution, so also, an amendment of the Constitution derives its validity from the Constitution. An amendment of the Constitution can be *ultra vires* just as an ordinary law can be.

1576. When a legislative body is also the sovereign Constitution-making body, naturally the distinction between Constitution and an ordinary law becomes conceptual and, in fact, disappears as that body has both the constituent power of the sovereign as well as legislative power. The British Constitution under which the distinction between the sovereign and the ordinary Legislature is eclipsed due to the theory of the sovereignty of the British Parliament, is certainly not the ideal constitution to choose for appreciating the distinction between constitutional law and ordinary law under our polity. Sir Ivor Jennings said that there is no clear distinction between constitutional law and ordinary law in England and that the only fundamental law there is that Parliament is supreme.[32] Strictly speaking, therefore, there is no constitutional law at all in Britain; there is only arbitrary power of parliament.

1577. It is said that the Bill of Rights (1689), Act of Settlement (1701), etc., partake the character of constitutional law and there is no reason to exclude that type of law from the ambit of the word 'law' in clause (2) of Article 13.

1578. In a flexible Constitution like the British Constitution the only dividing line between constitutional law and ordinary law is that constitutional law deals with a particular subject-matter, namely, the distribution of the sovereign power among the various organs of the State and other allied matters; but in India, as I have said, that distinction may not be quite relevant. For our purpose, the only relevant factor to be looked into is whether a provision is embodied in the Constitution of India. Any provision, whether it relates strictly to the distribution of sovereign power among the various organs of the State or not, if it is validly embodied in the document known as "The Constitution of India", would be a law relating to the Constitution. In other words, irrespective of the subject-matter, the moment a provision becomes validly embodied in the Constitution, it acquires a validity of its own which is beyond challenge and the question whether it relates to constitutional law with reference to the subject-matter is wholly irrelevant. "Where a written Constitution exists, it is approximately true to say that the Constitution itself provides such a supreme norm ....even so, the Constitution may not be altogether identified with the supreme norm; for there may be rules for its interpretation which judges accept as binding but which are not prescribed in the Constitution. Effectively, therefore, it is the traditional judicial interpretation of the constitution that is the supreme norm".[33] For, as Bishop Hoadley said in his sermon "Whoever hath absolute authority to interpret any written or spoken laws, it is he who is the law-giver to all intents and purposes and not the person who first wrote or spoke them".[34]

---

[32] *See* Jennings, *The Law and the Constitution* (1933), p. 54.

[33] *See* Stanley I. Benn, *The Uses of Sovereignty*, in the book *In Defence of Sovereignty*, edited by WJ Stankiewicz, 67, 70.

1579. As I said, for the purpose of Article 13(2), the only relevant question is whether an amendment of the Constitution is 'law'. Since both an amendment of the Constitution and an ordinary law derive their validity from the Constitution, the criterion that an ordinary law can be tested for its validity on the touchstone of the Constitution must equally apply to an amendment of the Constitution. Therefore, by and large, the only distinction between a law amending the Constitution and an ordinary law in a rigid constitution is that an amendment of the Constitution has always to be made in the manner and form specially prescribed by the Constitution.

1580. Mr. Palkhivala contended that when Articles 13(1) and 372 speak of "laws in force" in the territory of India immediately before the commencement of the Constitution, the expression would take in also all constitutional law existing in the territory of India immediately before the coming into force of the Constitution, and therefore, the word 'law' in clause (2) of Article 13 must also include constitutional law. Assuming that the expression "laws in force" in Articles 13(1) and 372 is wide enough to include constitutional law, the question is, what is the type of constitutional law that would be included? So far as British India was concerned, Article 395 repealed the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending and supplementing the latter Act. I am not sure whether there were any Orders passed under the Government of India Act which would he called constitutional law. That apart, I doubt whether the Government of India Act, 1935, and the Indian Independence Act, 1947, were constitutional laws in the sense of their being the supreme law of the land like the Constitution of India for both of them could have been repealed by the legal sovereign, namely, the British Parliament. And the reason why their provisions could not have been challenged in a Court of the Law was not that they were the supreme law of the land but because they were laws in conformity with the supreme law, namely, the will of the British Parliament. As regards the native States, the fact that the Courts therein could not have challenged the validity of the provisions of the Constitution promulgated by an absolute monarch would not show that those provisions could be equated with the provisions of the Constitution of India. A Constitution established by an absolute monarch will be enforced by the Court of the State, not because the Constitution is the supreme law of the State but because it is a law in conformity with the supreme law, namely, the supreme will of the monarch which alone is the supreme law, unless, as Alf Ross said, the Constitution was granted by the monarch with the intention that it should not be revocable.[35] Therefore, those constitutional laws cannot be characterised as constitutional laws in the sense in which we speak of the Constitution of India, for, such of the provisions of those constitutions in the native States existing before the commencement of the Constitution of India which contravened the provisions of Part III became void [Article 13(1)] and others which continued, continued subject to the provisions of the Constitution (Article 372). In other words, for the purpose of Article 13(2), what is relevant is whether the word 'law' there, is comprehensive enough to take in constitutional law in the sense of a law embodied in a constitution which is the supreme law of the land and from which all other laws derive their validity. The constitutional laws in force in the territory of India immediately before the commencement of the Constitution did not have the status of constitutional law in the sense of a law which is supreme. Were it otherwise, none of them would have been void under Article 13(1) and none of them subject to the provisions of the Constitution under Article 372.

---

[34] *See* Gray, *Nature and Sources of the Law*, 102, 125, 172 (2nd ed.) (1921).

[35] Alf Ross, "*On Law and Justice*", p. 82.

1581. It seems to me to be clear that the word 'law' in Article 13(2), in the context, could only mean an ordinary law. When Article 13(2) said that the State shall not make any 'law', the meaning of the expression 'law' has to be gathered from the context. Though, analytically, it might be possible to say that the word 'law' would include an amendment of the Constitution also, from the context it would be clear that it only meant ordinary law. A word by itself is not crystal clear. It is the context that gives it the colour. In the setting of Article 13(2), what was prohibited was that the Parliament shall not pass a law in pursuance of its powers under Chapter I of Part XI or any other provisions enabling it to pass laws, which were legislative in character. The Constitution-makers only wanted to provide against the more common invasion of Fundamental Rights by ordinary legislation.

1582. If the power to amend was to be found within Article 368 and not under Article 248 read with Entry 97 of List I of the Seventh Schedule, it stands to reason to hold that constituent power for amendment of the Constitution is distinct from legislative power. The leading majority in the *Golaknath case*[36] took pains to locate the power to amend in Article 248 read with Entry 97 of List I of the Seventh Schedule to show that the Constitution can be amended by an ordinary law and that such a law would be within the purview of Article 13(2). But if the power to amend the Constitution is a legislative power and is located in the residuary Entry (97 of List I of the Seventh Schedule), then any law amending the Constitution by virtue of that power, can be passed only "subject to the provisions of the Constitution" as mentioned in Article 245. A power of amendment by ordinary law "subject to the provisions of the Constitution" seems to me a logical contradiction; for, how can you amend the provisions of the Constitution by an ordinary law which can be passed only subject to the provisions of the Constitution?

1583. It would be strange that when a whole chapter has been devoted to the "Amendment of the Constitution" and when the question of amendment loomed large in the mind of the Constitution-makers that, even if the power to amend the Constitution was thought to be legislative in character, it was not put as a specific entry in List I but relegated to the residuary entry! And, considering the legislative history of the residuary entry, it is impossible to locate the power of amendment in that entry. The legislative power of Parliament under Entry 97 of List I of the Seventh Schedule is exclusive and the power to amend cannot be located in that entry because, in respect of the matters covered by the proviso to Article 368, Parliament has no exclusive power to amend the Constitution.

1584. That apart, the power to amend a rigid Constitution, not being an ordinary legislative power but a constituent one, it would be strange that the Constitution-makers put it *sub-silentio* in the residuary legislative entry.

1585. Article 368 was clear that when the procedure prescribed by the article was followed, what resulted was an amendment of the Constitution. The article prescribed a procedure different from the legislative procedure prescribed in Articles 107 to 111 read with Article 100. Article 100 runs as follows: "Save as otherwise provided in this Constitution all questions at any

---

[36] (1967) 2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

SCC Online

sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting……………" Certain types of amendment, as is clear from Article 368, also require to be ratified. The first part of Article 368 required that a bill must be passed in each House: (1) by a majority of the total membership of that House and (2) by a majority of not less then two-thirds of the members of that House present and voting. These provisions rule out a joint sitting of both the Houses, under Article 108 to resolve disagreement between the two Houses. Again, the majority required to pass a bill in each House is not a majority of the members of that House present and voting but a majority of the total membership of each House and a majority of not less than two-thirds of the members of that House present and voting. As regards matters covered by the proviso, there is a radical departure from the legislative procedure prescribed for Parliament by Articles 107 to 111. Whereas in ordinary legislative matters Parliament's power to enact laws is not dependent on the State Legislatures, in matters covered by the proviso to Article 368, even if the two Houses pass a bill by the requisite majorities, the bill cannot be presented to the President for his assent unless the bill has been ratified by resolutions to that effect passed by the Legislatures of not less than half the number of States.

1586. Subba Rao, C. J., in his judgment in *Golaknath case*[37] relied on *McCawley* v. *The King*[38] and the *Bribery Commissioner* v. *Pedrick Ranasinghe*[39] to show that the power to amend the Constitution was a legislative power. In *McCawley's case* (supra) Lord Birkenhead said that it is of the utmost importance to notice that where the Constitution is uncontrolled the consequences of its freedom admit of no qualification whatever and that it would be an elementary common place that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as the Dog Act or any other Act, however humble its subject-matter and that the so called constitutional law (I call them so called because it is constitutional law only with reference to the subject-matter, not with reference to its superior character) will stand amended by the Dog Act, if it is in any way repugnant to the legislative document or documents.

1587. In *Ranasinghe's case* (supra), the question for determination before the Privy Council was whether the statutory provisions for the appointment of members of the penal of the Bribery Tribunal, otherwise than by the Judicial Service Commission, violated Section 55 of the Constitution Order and, if so, whether that provision was void. Sections 18 and 29 of the Order provide as follows:

> "*Section 18.*—Save as otherwise provided in sub-section (4) of Section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. The President or Speaker or other person presiding shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes."
>
> "*Section 29.*—(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. (2) No such law shall: (*a*) prohibit or restrict the free exercise of any religion; or (*b*) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (*c*) confer on persons of any

---

[37] (1967)2 SCR 762: AIR 1967 SC 1643: (1967)2 SCJ 486.

[38] (1920) AC 691.

[39] (1964)2 WLR 1301: (1965) AC 172.

community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or (*d*) alter the Constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body. (3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void. (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island: Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented to the Royal Assent unless it has endorsed on it a certificate under the hand of the speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present). Every certificate of the Speaker under this sub-section shall be conclusive for all purpose and shall not be questioned in any court of law."

1588. The appellant contended that whereas Section 29(3) expressly provided that a law which contravened Section 29(2) was void, there was no such provision for the violation of Section 29(4) which was merely procedural and that as Ceylon was a sovereign State and had the power to amend the Constitution, any law passed by the legislature was valid even if it contravened the Constitution, and *McCawley's case* (supra) was cited as supporting this contention. But the Privy Council said that the law impugned in *McCawley case* (supra) was not required to be passed by a special procedure, but in the present case the law which contravened Section 55 could only be passed as required by Section 29 (4) for the amendment of the Constitution and as it was not so passed, it was *ultra vires* and void.

1589. It is not possible to draw the inference which Subba Rao, C. J., drew from these two cases. There is a distinction between a general power to legislate and a power to legislate by special legislative procedure and the results of the exercise of the two powers are different. In *McCawley's case* (supra) it was observed that if a Legislature has full power to make a law which conflicted with the Constitution, the law was valid since it must be treated as a *pro-tanto* amendment of the Constitution which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with, and an ordinary law in conflict with the Constitution must, in such a case be treated as an implied alteration of the Constitution. In *Ranasinghe's case* (supra) the Privy Council said that where even an express power of a Legislature to alter can be exercised only by laws which comply with the "Special legislative procedure laid down in the Constitution", such a Legislature has no general power to legislate for the amendment of the Constitution, and a law passed in the exercise of such general power is void if the law contravenes the Constitution, And, where a legislative power is "subject to the provisions of the Constitution", any exercise of it in contravention of such provisions renders it invalid and *ultra vires*. As already stated, in a controlled Constitution which confers general legislative power subject to the provisions of the Constitution and provides a special procedure for amendment of the Constitution, law passed in the exercise of the general legislative power and conflicting with the Constitution must be void because the Constitution can be amended only by special procedure. In a Constitution which confers general legislative power including a power to amend the Constitution, the Constitution is uncontrolled and is not a fundamental document which the laws made under it are to be tested, for, any law contrary to the Constitution impliedly alters it. The result is that no law passed under an uncontrolled Constitution is *ultra vires.*[40]

1590. The substance of the decision in *Ranasinghe's case* (supra) is that though Ceylon Parliament has plenary power of ordinary legislation, in the exercise of its constituent power it was subject to the special procedure laid down in Section 29(4). The decision, therefore, makes a clear distinction between legislative and constituent powers.

1591. It was contended that the amending power can be a legislative power as in Canada and, therefore, there was nothing wrong in the leading majority in *Golaknath case*[41] locating the power of amendment in the residuary entry.

1592. Section 91(1) of the British North America Act provides for a restricted power of amendment of the Constitution. This power, undoubtedly, is a legislative power and the Constitution, therefore, to that extent is an uncontrolled or a flexible one. There is no analogy between the power of amendment in Canada which is legislative in character and the power of amendment under Article 368 which is a constituent power. As I indicated, even if there was an entry for amending the Constitution in List I of the Seventh Schedule, that would not have enabled the Parliament to make any amendment of the Constitution because the opening words of Article 245 "subject to the provisions of this Constitution" would have presented an insuperable bar to amend any provision of the Constitution by the exercise of legislative power under the Constitution. Under a controlled Constitution like ours, the power to amend cannot be a legislative power; it can only be a constituent power. Were it otherwise, the Constitution would cease to be a controlled one.

1593. It was submitted that if Fundamental Rights were intended to be amended by the Constitution-makers in such a way as to abridge or take them away, considering the paramount importance of these rights, the procedure required by the proviso to Article 368 would, at any rate, have been made mandatory and that not being so, the intention of the Constitution-makers was that the Fundamental Rights should not be amended in such a way as to abridge or take them away. This argument overlooks the purpose of the proviso. The proviso was mainly intended to safeguard the rights and powers of the States in their juristic character as person in a federation. The purpose of the proviso was that the rights, powers and privileges of the States or their status as States should not be taken away or impaired without their participation to some extent in the amending process. Fundamental Rights are rights of individuals or minorities, and they are represented in Parliament. The States, as States, are not particularly affected by amendment of Fundamental Rights. As Wheare said, it is essential in a federal government that if there be a power of amending the Constitution, that power, so far at least as concerns those provisions of the Constitution which regulate the status and powers of the general and regional governments, should not be confided exclusively either to the general governments or to the regional governments.[42]

---

[40] *See* Seervai, *Constitutional Law,* Vol. 2, pp. 1102-1103; also Dr. Wynes, "*Legislative, Executive and Judicial Powers in Australia*" footnote at p. 508.

[41] (1967)2 SCR 762 : AIR 1967 SC 1643 : (1967)2 SCJ 486.

[42] Wheare, *Federal Government,* 4th ed. p. 55.

1594. The Constitution (First Amendment) Act amended the Fundamental Rights under Articles 15 and 19 in such a way as to abridge them. The speech of Pandit Jawaharlal Nehru in moving the amendment and those of others who were responsible for drafting the Constitution make it clear that they never entertained any doubt as to the amendability of the Fundamental Rights in such a way as to abridge them. Strong opponents of the amendments like S. P. Mukherjee, never made even the whisper of a suggestion in their speeches that Fundamental Rights were not amendable in such a way as to abridge them. Contemporaneous practical exposition is a valuable aid to the meaning of a provision of the Constitution or a statute[43].

1595. Mr. Palkhivala also relied upon the speech of Dr. Ambedkar made on September 17, 1949, in the Constituent Assembly to show that Fundamental Rights could not be taken away or abridged by an amendment of the Constitution.

1596. The question whether speeches made in the Constituent Assembly are admissible to ascertain the purpose behind a provision of the Constitution is not free from doubt. In *A. K. Gopalan* v. *The State of Madras*,[44] Kania, C. J., said that while it is not proper to take into consideration the individual opinions of members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether acertain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the same case, Patanjali Sastri, J., said that in construing the the provisions of an Act, speeches made in the course of the debates on a bill could at best be indicative of the subjective intent of the speaker but they could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Mukherjea, J., said that in construing a provision in the Constitution it is better to leave out of account the debates in the Constituent Assembly, but a higher value may be placed on the report of the Drafting Committee. In *State of Travancore-Cochin and Others* v. *The Bombay Co. Ltd. etc.*[45]. Patanjali Sastri, C. J., delivering the judgment of the Court said that speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used as aids for interpreting the Constitution. In *Golaknath case*[46] Subba Rao, C. J., referred to the speech of Pandit Jawaharlal Nehru made on April 30, 1947, in proposing the adoption of the interim report on Fundamental Rights and that of Dr. Ambedkar made on September 18, 1949, on the amendment proposed by Mr. Kamath to Article 304 of the draft Constitution (present Article 368) and observed that the speeches were referred to, not for interpreting the provisions of Article 368 but to show the transcendental character of Fundamental Rights. I am not clear whether the speech of Dr. Ambedkar throws any light on the transcendental character of Fundamental Rights. That speech, if it is useful for any purpose, is useful only to show that Fundamental Rights cannot be amended. In the *Privy Purse case*[47] Shah, J. referred to the speech of Sardar Vallabhbhai Patel for understanding the purpose of Article 291 of the Constitution. Speeches made by members of the Constituent Assembly were quoted in profusion in the *Union of India* v. *Harbhajan Singh Dhillon*[48] both in the majority as well as in the minority judgments. In the majority judgment it was said that they were glad to find that the construction placed by them on the scope of Entry 91 in the draft Constitution corresponding to the present Entry 97 of List I of the Seventh Schedule agreed with the view expressed in the speeches referred to by them. The minority referred to the speeches made by various members to show that their construction was the correct one. Cooley said: "When a question of Federal Constitutional law is involved, the purpose of the Constitution, and the object to be accomplished by any particular grant of power, are often most important guides in reaching the real intent; and the debates in the Constitutional Convention, the discussions in the Federalist, and in the conventions of the States, are often referred on as throwing important light on clauses in the Constitution which seem blind or of ambiguous import".[49] Julius Stone, the Australian jurist, has expressed the opinion that in principle the Court should be free to inform itself concerning the social context of the problems involved from all reliable sources and that it is difficult to see in principle why British courts should exclude rigidly all recourse to the debates attending the legislative process. He asked the question on what basis is it explicable that lawyers can regard with equanimity cases in which judges may pronounce *ex-cathedre* that so and so clearly could not have been in the legislators' minds when the parliamentary debates ready at hand might show that that was precisely what was in their minds.[50]

---

[43] See *McPherson* v. *Blacker*, 146 US 1, 27.

[44] 1950 SCR 88 : AIR 1950 SC 27 : 1950 SCJ 174 : 51 Cri LJ 1383.

[45] (1952) SCR 1112 : AIR 1952 SC 366 : 1952 SCJ 527 : (1952)3 STC 434.

[46] (1967)2 SCR 762, 791 : AIR 1967 SC 1643 : (1967)2 SCJ 486.

[47] *Madhav Rao* v. *Union of India*, (1971) 3 SCR 9, 83 : (1971)1 SCC 85,153.

[48] (1971) 2 SCC 779.

1597. Logically, there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which will resolve latent ambiguity in a provision of Constitution. Chief Justice Marshall struck at the core of the matter when he said[51]:

> "Where the mind labours to discover the design of the Legislature, it seizes everything from which aid can be derived".

If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should, as a matter of theory, be excluded. The rigidity of English Courts in interpreting language merely by reading it, disregards the fact that enactments are, as it were organisms which exist in their environment. It is, of course, difficult to say that judges who profess to exclude from their consideration all extrinsic sources are confined psychologically as they purport to be legally. A judge who deems himself limited to reading the provisions of the Constitution without an awareness of the history of their adoption in it would be taking a mechanical view of the task of construction[52].

1598. If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision. Mr. W. Anderson said: "The nearer men can get to knowing what was intended the better. Indeed the search for intention is justified as a search for the meanings that the framers had in mind for the words used. But it is a search that must be undertaken in humility and with an awareness of its great difficulties"[53]. That awareness must make one scrutinize the solemnity of the occasion on which the speech was made, the purpose for which it was made, the preparation and care with which it was made and the reputation and scholarship of the person who made it. A painstaking detailed speech bearing directly on the immediate question might be given the weight of an "encyclical" and would settle the matter one way or the other; but a loose statement made *impromptu* in the heat of the debate will not be given a decisive role in decision-making process. I should have thought that if there was a definitive pronouncement from a person like Dr. Ambedkar in the Constituent Assembly, that would have thrown considerable light upon the matter in controversy. In the speech relied on by counsel, Dr. Ambedkar is reported to have said:[54]

---

[49] *See* Cooley on *Constitutional Law*, 4th ed. (1931), pp. 195-196.

[50] *See* Julius Stone, *"Legal System and Lawyers' Reasoning"*, p. 351; see also HCL Merillat, *"The Sound Proof Room: A Matter of Interpretation"*, (1967)9, *Journal of the Indian Law Institute*, p. 521.

[51] *United States* v. *Fisher*, 2 Cranch 358, 386 US 1805.

[52] *See* Frankfurter *"On reading the Statute"* in "Of Law and Men", p. 64.

> "We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article, which is not mentioned in Part III or Article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it.
>
> "Mr. President: Of Members present.
>
> "Yes. Now we have no doubt put certain articles in a third category where for the purpose of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States."

There is scope for doubt whether the speech has been correctly reported. That apart, from the speech as reported, it would seem that according to Dr. Ambedkar, an amendment of the articles mentioned in Part III and Article 368 requires two-thirds majority plus ratification by the States. He seems to have assumed that the provisions of Part III would also fall within the proviso to Article 368 but he never said that Part III was not amendable. That it was his view that all the articles could be amended is clear from his other speeches in the Constituent Assembly. He said on November 4, 1948:[55]

> '.........It is only for amendments of specific matters ....and they are only few, that the ratification of the State legislatures is required. All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House . . ."

Dr. Ambedkar, speaking on draft Article 25 (present Article 32) on December 9, 1948, stressed its importance in the following words.[56]

---

[53] See "*The Intention of the Framers: A Note on the Constitutional Interpretation*", *American Political Science Review*, Vol. XLIX, June, 1955.

[54] *Constituent Assembly Debates*, Vol. IX, p. 1661.

[55] *Constituent Assembly Debates*, Vol. VII, p. 43.

[56] *Constituent Assembly Debates*, Vol. VII, p. 953.

> "If I was asked to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance."

But having said that, he proceeded:

> "…………The Constitution has invested the Supreme Court with these rights and these writs could not be taken away unless and until the Constitution itself is *amended by means left open to the Legislature.*" (Emphasis added).

On November 25, 1949, Dr. Ambedkar refuted the suggestion that Fundamental Right should be absolute and unalterable. He said after referring to the view of the Jefferson already referred to, that the Assembly has not only refrained from putting a seal of finality and infallibility upon the Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia but has provided a most facile procedure for amending the Constitution.[57]

1599. It is difficult to understand why the Constitution-makers did not specifically provide for an exception in Article 368 if they wanted that the Fundamental Rights should not be amended in such a way as to take away or abridge them. Article 304 of the draft Constitution corresponds to Article 368 of the Constitution. Article 305 of the draft Constitution provided:

> "*Article 305—Reservation of seats for minorities to remain in force for only ten years unless continued in operation by amendment of the Constitution.*—Notwithstanding anything contained in Article 304 of the Constitution, the provision of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the Legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution."

If it had been the intention of the Drafting Committee to exclude Fundamental Rights from the purview of the constituent power intended to be conferred by Article 304, following the analogy of Article 305, it could have made an appropriate provision in respect of the said rights.

1600. In *A. K. Gopalan* v. *State of Madras*[58], Kania, C. J., said that Article 13(2) was inserted by way of abundant caution, that even if the article were absent, the result would have been the same. Mr. Palkhivala submitted that the view of the learned Chief Justice was wrong, that Article 13 in the context of Article 368 before the 24th Amendment, had a function to play in the scheme of the Constitution, namely, that it stated the authorities against which the inhibition in Article 13(2) operated, the categories of law to which the inhibition applied and the effect of a violation of the inhibition. Whether the latter part of Article 13(2) was enacted by way of abundant caution or not would depend upon the answer to the question whether the word 'law' in that article would includes an amendment of the Constitution also. If the word 'law' would include amendment of the Constitution, it cannot be said that the latter part of the article was redundant. The dictum of Chief Justice Kania is helpful only to show his reading of the meaning of the word 'law' in the article. Had the learned Chief Justice read the word 'law' in the article as including an amendment of the Constitution also, he would certainly not have said that the article was redundant. Sir Ivor Jennings has taken the view that it was quite unnecessary to have enacted Article 13(2), as even otherwise, under the general doctrine of *ultra vires*, and any law which is repugnant to the provisions of the Constitution, would, to the extent of the repugnancy, become void and inoperative.[59]

---

[57] *Constituent Assembly Debates*, Vol. XI, pp. 975-976.

[58] 1950 SCR 88: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

1601. However, I think that Article 13(2) was necessary for a different purpose, namely, to indicate the extent of the invasion of the fundamental right which would make the impugned law void. The word 'abridge' has a special connotation in the American constitutional jurisprudence; and, it is only fair to assume that when the Constitution-makers who were fully aware of the language of the First Amendment to the United States Constitution, used that expression, they intended to adopt the meaning which that word had acquired there. Every limitation upon a fundamental right would not be an abridgment of it. Whether a specific law operates to abridge a specifically given fundamental right cannot be answered by any dogma, whether of *a priori* assumption or of mechanical jurisprudence. The Court must arrive at a value judgment as to what it is that is to be protected from abridgment, and then, it must make a further value judgment as to whether the law impugned really amounts to an abridgment of that right. A textual reading might not always be conclusive. A judge confronted with the question whether a particular law abridges a Fundamental Right must, in the exercise of his judicial function, advert to the moral right embodied in the Fundamental Right and then come to the conclusion whether the law would abridge that right. In this process, the Court will have to look to the Directive Principles in Part IV to see what exactly is the content of the Fundamental Right and whether the law alleged to be in detraction or abridgment of the right is really so. The Court would generally be more astute to protect personal rights than property rights. In other words, Fundamental Rights relating to personal liberty or freedom would receive greater protection from the hands of the Court than property right, as those rights come with a momentum lacking in the case of shifting economic arrangements. To put it differently, the type of restriction which would constitute abridgment might be different for personal rights and property rights as illustrated by the doctrine of preferred freedoms. However, it is unnecessary to pursue the matter further for the purpose of this case.

1602. Mr. Palkhivala contended that even if the word 'amendment' in Article 368 before it was amended is given its widest meaning and the word 'law' in Article 13(2) is assumed not to include an amendment of the Constitution there were and are certain inherent and implied limitations upon the power of amendment flowing from three basic features which must be present in the Constitution of every republic. According to counsel, these limitations flow from the fact that the ultimate legal sovereignty resides in the people; that Parliament is a creature of the Constitution and not a constituent body and that the power to alter or destroy the essential features of the Constitution belongs only to the people, the ultimate legal sovereign. Counsel submitted that if Parliament has power to alter or destroy the essential features of the Constitution, it would cease to be a creature of the Constitution and would become its master; that no constituted body like the Amending Body can radically change the Constitution in such a way as to damage or destroy the basic constitutional structure, as the basic structure was decided upon by the people, in the exercise of their constituent revolutionary power. Counsel also argued that it is constitutionally impermissible for one constituent assembly to create a second perpetual constituent assembly above the nation with power to alter its essential features and that Fundamental Rights constitute an essential feature of the Constitution.

---

[59] *See* Ivor Jennings, "*Some Characteristics of the Indian Constitution*", pp. 38-39.

1603. The basic premise of counsel's argument was that the ultimate legal sovereignty under the Constitution resides in the people. The preamble to the Constitution of India says that "We the people of India………… adopt, enact and give unto ourselves this Constitution". Every one knows that historically this is not a fact. The Constitution was framed by an assembly which was elected indirectly on a limited franchise and the assembly did not represent the vast majority of the people of the country. At best it could represent only 28.5 per cent. of the adult population of the provinces, let alone the population of the Native States.[60] And who would dare maintain that they alone constituted the "people" of the country at the time of framing the Constitution?[61] The Constituent Assembly derived its legal competence to frame the Constitution from Section 8(1) of the Indian Independence Act, 1947. The British Parliament, by virtue of its legal sovereignty over India, passed the said enactment and invested the Assembly with power to frame the Constitution. Whether might be the Constitutional result flowing from the doctrine that sovereignty is inalienable and that the Indian Independence Act itself could have been repealed by Parliament, independence, once granted, cannot be revoked by an erstwhile sovereign; at any rate, such revocation will not be recognised by the Courts of the country to which independence was granted. What makes a transfer of sovereignty binding is simply the possession on the part of the transferee of power and force sufficient to prevent the transferor from regaining it.[62] The assertion by some of the makers of the Constitution that the Constitution proceeded from the people can only be taken as a rhetorical flourish, probably to lay its foundation on the more solid basis of popular will and to give it an unquestioned supremacy, for, ever since the days of Justinian, it was thought that the ultimate legislative power including the power to frame a Constitution resides in the people, and, therefore, any law or Constitution must mediately or immediately proceed from them. "It is customary nowadays to ascribe the *legality* as well as the *supremacy* of the Constitution—the one is, in truth, but the obverse of the other—exclusively to the fact that, in its own phraseology, it was 'ordained' by 'the people of the United States'. Two ideas are thus brought into play. One is the so-called 'positive' conception of law as a general expression merely for the particular commands of a human law giver, as a series of acts of human will; the

---

[60] *See* Granville Austin, "*The Indian Constitution*" (1972), p. 10 and Appendix I, pp. 331-332.

[61] As to who are the people in a country, *See* the Chapter "*The People*" in "*Modern Democracies*" by Bryce, Vol. 1, pp. 161-169.

[62] *See* Willoughby, "*Nature of State*", (1896) p. 229; also *Dicey's* "*Law of the Constitution*", 5th Ed., (1897), pp. 65n and 66n.

SCC Online

other is that the highest possible embodiment of human will, is 'the people'. The same two ideas occur in conjunction in the oft-quoted text of Justinian's *Institute's*: "Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority. The sole difference between the Constitution of the United States and the imperial legislation justified in this famous text is that the former is assumed to have proceeded immediately from the people, while the latter proceeded from a like source only mediately".[63]

1604. It is said that the assertion in the preamble that it was the people who enacted the Constitution raises an incontrovertible presumption and a Court is precluded from finding out the truth. There is a similar preamble to the Constitution of the U.S.A. Yet, when Chief Justice Marshall was called upon to decide the question whether that Constitution proceeded from the people, he did not seek shelter under the preamble by asserting that the Court is concluded by the recital therein, but took pains to demonstrate by referring to historical facts that the Constitution was ratified by the people in the State conventions and, therefore, in form and substance, it proceeded from the people themselves.[64] It does not follow that because the people of India did not frame the Constitution or ratified it, the Constitution has no legal validity. The validity of a Constitution is one thing; the source from which it proceeds is a different one. Apart from its legal validity derived from the Indian Independence Act, its norms have become efficacious and a Court which is a creature of the Constitution will not entertain a plea of its invalidity. If the legal source for the validity of the Constitution is not that it was framed by the people, the amending provision has to be construed on its own language, without reference to any extraneous consideration as to whether the people did or did not delegate all their constituent power to the Amending Body or that the people reserved to themselves the Fundamental Rights.

1605. Let me, however, indulge in the legal fiction and assume, as the preamble has done, that it was the people who framed the Constitution? What followed? Could it be said that, after the Constitution was framed, the people still retain and can exercise their sovereign constituent power to amend or modify the basic structure or the essential features of the Constitution by virtue of their legal sovereignty?

1606. According to Austin, a person or body is said to have legal sovereignty, when he or it has unlimited law-making power and that there is no person or body superior to him or it. Perhaps, it would be correct to say that the possession of unlimited law-making power is the criterion of legal sovereignty in a State, for, it is difficult to see how there can be any superior to a person or group that can make laws on all subjects since that person or group would pass a law abolishing the powers of the supposed superior. The location of sovereignty in a quasi-federal Constitution like ours is a most difficult task for any lawyer and I shall not attempt it. Many writers take the view that sovereignty in the Austinian sense does not exist in any State[65] and that, at any rate, in a federal State, the concept of sovereignty in that sense is incapable of being applied.[66] This Court has said in *State of West Bengal* v. *Union of India*[67], that the "legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country" and that the "...... Legal sovereignty of the Indian nation is vested in the people of India, who, as stated by the preamble, have solemnly resolved to constitute India into a Sovereign Democratic Republic... ....." I am not quite sure of the validity of the assumption implicit in this dictum. The Supreme Court of U. S. A. has held that sovereignty vests in the people.[68] The same view has been taken by writers like Jameson, Willis, Wilson and others. But it is difficult to understand how the unorganised mass of the people can *legally* be sovereign. In no country, except perhaps in a direct democracy, can the people *en masse* be called legally sovereign. This is only to put more explicitly what Austin meant when he said that political power must be in a determinate person or body of persons, for, the people at large, the whole people, as distinct from particular person or persons, are incapable of concerted action and hence, of exercising political power and, therefore, of legal supremacy.[69] "When the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are Rules of Law logically prior to him........It is not impossible to ascertain the will of an individual without the aid of rules: he may be presumed to mean what he says, and he cannot say more than one thing at a time. But the extraction of a precise expression of will from a multiplicity of human beings is, despite all the realists say, an artificial process and one which cannot be accomplished without arbitrary rules. It is, therefore, an incomplete statement to say that in a State such and such an assembly of human beings is sovereign. It can only be sovereign when acting in a certian way prescribed by law. At least some rudimentary manner and form is demanded of it: the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible[70] While it is true that the sovereign cannot act otherwise than in compliance with law, it is equally true that it creates the law in accordance with which it is to act.[71] And what is the provision in the Constitution or the law for the people to act as legal sovereign or as regards the manner and form when they act as legal sovereign?

---

[63] See Edward Corwin, "*The 'Higher Law' Background of American Constitutional Law*", pp. 3-4.

[64] See *McCulloch* v. *Maryland*, 4 Wheaton 316(1819).

[65] See W. J. Rees, "*Theory of Sovereignty Re-stated*" in the book "*In Defence of Sovereignty*" by W. J. Stankiewicz, p. 209.

1607. The supremacy enjoyed by the Constitution has led some to think that the document must be regarded as sovereign. They talk about the government of laws and not of man; our sovereignty, by definition, must be vested in a person or body of persons. The Constitution itself is incapable of action. Willoughby has said that sovereignty of the people, popular sovereignty and national sovereignty cannot accurately be held to mean that, under an established government, the sovereignty remains in the people. It may mean, however, that the Constitutional jurisprudence of the State to which it is applied is predicated upon the principle that no political or individual or organ of the Government is to be regarded as the source whence, by delegation, all other public powers are derived, but that, upon the contrary, all legal authority finds its original source in the whole citizen body or in an electorate representing the governed.[72] Probably, if sovereignty is dropped as a legal term and viewed as a term of political science, the view of the Supreme Court of the U. S. A. and the writers who maintain that the people are sovereign might be correct. No concept has raised so many conflicting issues involving jurists and political theorists in so desperate a maze as the genuine and proper meaning of sovereignty.

---

[66] *See* Salmond's *Jurisprudence*, 7th ed. p. 531.

[67] (1964)1 SCR 371, 396-398: AIR 1963 SC 1241.

[68] See *Chisholm* v. *Georgia*, (1793)2 Dallas 419, 470-471.

[69] See "*From John Austin to John C. Hurd*" by Irving *B. Richman in Harvard Law Review*, Vol. 14, p. 364.

[70] *See* Latham, "*What is an Act of Parliament*", (1939) King's Counsel, p. 152.

[71] *See* Orfied, "*The Amending of the Federal Constitution*", p. 255.

1608. Seeing, however, that the people have no constitutional or legal power assigned to them under the Constitution and that by virtue of their political supremacy they can unmake the Constitution only by a method not sanctioned by the juridical order, namely, revolution, it is difficult to agree with the proposition of counsel that the *legal sovereignty* under the Constitution resides in the people, or, that as ultimate legal sovereign the people can constitutionally change the basic structure of the Constitution even when the Constitution provides for a specific mechanism for its amendment. In the last analysis, perhaps, it is right to say that if sovereignty is said to exist in any sense at all, it must exist in the Amending Body, for, as Willoughby has said: "In all those cases in which owning to the distribution of governing power there is doubt as to the political body in which sovereignty rests, the test to be applied is, the determination of which authority has, in the last instance the legal power to determine its own competence as well as that of others.[73] In Germany, the publicists have developed a similar theory known as the "kompetenz-kompetenz theory".[74]

1609. This, however, does not mean that the people have no right to frame the Constitution by which they would be governed. Of the people as well as the body politic, all that one can say is, not that they are sovereign, but that they have the natural right to full autonomy or to self-government. The people exercise this right when they establish a Constitution.[75] And, under our Constitution, the people have delegated the power to amend the instrument which they created to the Amending Body.

1610. When a person holds a material good, it cannot be owned by another. He cannot give it to another without his losing possession of it and there can only be a question of transfer of ownership or a donation. But, when it is a question of a moral or spiritual quality such as a right or power, one can invest another with a right or power without losing possession of it, if that man receives it in a vicarious manner, as a vicar of the men who transferred it. The people are possessed of their right to govern themselves in an inherent and permanent manner, their representatives are invested with power which exists in the people, but in a vicarious manner.[76]

1611. Delegation does not imply a parting with powers of one who grants the delegation but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. It does not mean that the delegating person parts with the power in such a way as to denude himself of his sights.[77]

---

[72] *See* Willoughby, "*Fundamental Concepts of Public Law*", pp. 99-100.

[73] Willoughby, "*The Nature of State*", (1928) p. 197.

[74] *See* Merriam, "*History of the Theory of Sovereignty since Rorseau*", (1900), 190-196.

[75] *See* Jacques Maritain, "*Man and the State*", p. 25.

[76] *See* Jacques Maritain, *Man and the State*", pp. 134-135.

[77] See *Huth* v. *Clarke*, (1890)25 QBD 391, 395; also John Willis, "*Delegatus non potest delegare*", 21 Canadian Bar Review, p. 257.

1612. I will assume that the people, by designating their representatives and by transmitting to them the power to amend the Constitution, did not lose or give up possession of their inherent constituent power. There was great controversy among the civilians in the Middle Ages whether, after the Roman people had transferred their authority to legislate to the emperor, they still retained it or could reclaim it.[78] There is always a distinction between the possession of a right or power and the exercise of it. It was in the exercise of the constituent power that the people framed the Constitution and invested the Amending Body with the power to amend the very instrument they created with a super-added power to amend that very power. The instrument they created, by necessary implication, limits the further exercise of the power by them, though not the possession of it. The Constitution, when it exists, is supreme over the people and, as the people have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it and have directly placed that power in their representatives without reservation, it is difficult to understand how the people can juridically resume the power to continue to exercise it.[79] It would be absurd to think that there can be two bodies for doing the same thing under the Constitution. It would be most incongruous to incorporate in the Constitution a provision for its amendment, if the constituent power to amend can also be exercised at the same time by the mass of the people, apart from the machinery provided for the amendment. In other words, the people having delegated the power of amendment, that power cannot be exercised in any way other than that prescribed nor by any instrumentality other than that designated for that purpose by the Constitution. There are many Constitutions which provide for active participation of the people in the mechanism for amendment either by way of initiative or referendum as in Switzerland, Australia and Eire. But, in our Constitution, there is no provision for any such popular device and the power of amendment is vested only in the Amending Body.

1613. It is said that "it is within the power of the people who made the Constitution to un-make it, that it is the creature of their own will and exists only by their will.[80] This dictum has no direct relevancy on the question of the power of the people to amend the Constitution. It only echoes the philosophy of John Locke that people have the political right to revolution in certain circumstances and to frame a Constitution in the exercise of their revolutionary constituent power.

1614. When the Frecnh political philosophers said that the nation alone possesses the constituent power, and an authority set up by a Constitution created by the nation has no constituent power apart from a power to amend that instrument within the lines originally adopted by the people, what is meant is that the nation cannot part with the constituent power, but only the power to amend the Constitution within the original scheme of the Constitution in minor details. Some jurists refer to these two powers, namely, the "Constituent power" and the "amending power" as distinct. According to Carl, J. Friedrich, the constituent power is the power which seeks to establish a Constitution which, in the exact sense, is to be understood the *de facto* residuary power of a not inconsiderable part of the community to change or replace an established order by a new Constitution. The constituent power is the power exercised in establishing a Constitution, that is the

---

[78] See Carlyle, "*A History of Medieval Political Theory in the West*", Vol. VI, p. 514-515.

[79] See *Dodge* v. *Woolsey*, (1856) 18 How, 331, 348.

[80] See *Cohens* v. *Virginia*, 6 Wheat (19 US) 264, 381.

SCC Online

fundamental decision on revolutionary measures for the organisation and limitation of a new Government. From this constituent power must be distinguished the amending power which changes an existing constitution in form provided by the Constitution itself, for the amending power is itself a constituted authority. And he further points out that in French Constitutional Law the expression *pouvoir constituant* is often used to describe the 'amending authority' as well as the constituent power, but the expression constituent power, used by him is not identical with the *pouvoir constituant* of the French Constitutional Law.[81] It is, however, unnecessary to enter this arid tract of what Lincoln called 'pernicious abstraction' where no green things grow, or resolve the metaphysical niceties, for, under our Constitution, there is no scope for the constituent power of amendment being exercised by the people after they have delegated power of amendment to the Amending Body. To what purpose did that instrument give the Amending Body the power to amend the amending power itself, unless it be to confer plenary power upon the Amending Body to amend all or any of the provisions of the Constitution ? It is no doubt true that some German thinkers, by way of protest against indiscriminate use of the amending power under the Weimer Constitution of Germany, asserted that the power of amendment is confined to alteration within the constitutional text and that it cannot be used to change the basic structure of the Constitution. But, as I said, to say that a nation can still exercise unlimited constituent power after having framed a Constitution vesting plenary power of amendment under it in a separate body, is only to say that the people have the political power to change the existing order by means of a revolution. But this doctrine cannot be advanced to place implied limitations upon the amending power provided in a written Constitution.

1615. It is, therefore, only in revolutionary sense that one can distinguish between constituent power and amending power. It is based on the assumption that the constituent power cannot be brought within the framework of the Constitution. "To be sure, the amending power is set up in the hope of anticipating a revolution by legal change and, therefore, as an additional restraint upon the existing government. But should the amending power fail to work, the constituent power may emerge at the critical point.[82] The proposition that an unlimited amending authority cannot make any basic change and that the basic change can be made only by a revolution is something extra-legal that no Court can countenance it. In other words, speaking in conventional phraseology, the real sovereign, the hundred per cent. sovereign — the people — can frame a Constitution, but that sovereign can come into existence thereafter unless otherwise provided, only by revolution. It exhausts itself by creation of minor and lesser sovereigns who can give any command. And, under the Indian Constitution, the original sovereign — the people — created, by the amending clause of the Constitution, a lesser sovereign, almost co-extensive in power with itself. This sovereign, the one established by the revolutionary act of the full or complete sovereign has been called by Max Radin the "pro-sovereign", the holder of the amending power under the Constitution. The hundred per cent. sovereign is established only by revolution and he can come into being again only by another revolution.[83] As Wheare clearly puts it, once the Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter, not only the institutions which it establishes, but also the people themselves. They may amend the Constitution, if at all, only by the method which the Constitution itself provides.[84] This is illustrated also in the case of the sovereign power of the people to make laws. When once a Constitution is framed and the power of legislation which appertains to the people is transferred or delegated to an organ constituted under the Constitution, the people cannot thereafter exercise that power. "The legal assumption that sovereignty is ultimately vested in the people affords no legal basis, for the direct exercise by the people of any sovereign power, whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislation directly only if their Constitution so provides".[85]

---

[81] *See* Carl, J. Friedrich, "*Constitutional Government and Politics*", (1937) pp. 113, 118, 162 and 521.

[82] *See* Carl, J. Friedrich, "*Constitutional Government and Democracy*", (1950).

[83] *See* Max Radin, "*Intermittent Sovereign*", 39 Yale Law Journal 514.

1616. It is said that although the Constitution does not provide for participation of the people in the process of amendment, there is nothing in the Constitution which prohibits the passing of a law under the residuary Entry 97 of List I of the Seventh Schedule for convoking a constituent assembly for ascertaining the will of the people in the matter of amendment of Fundamental Rights. Hoar says: "The whole people in their sovereign capacity, acting through the forms of law at a regular election, may do what they will with their own frame of government, even though that frame of government does not expressly permit such action, and even though the frame of government attempts to prohibit such action".[86] Again, he says: "Thus we come back to the fact that all conventions are valid if called by the people speaking through the electorate at a regular election. This is true regardless of whether the Constitution attempts to prohibit or authorize them, or is merely silent on the subject. Their validity rests not upon constitutional provisions nor upon legislative act, but upon the fundamental sovereignty of the people themselves".[87] As to this, I think the answer given by Willoughby is sufficient. He said: "The position has been quite consistently taken that constitutional amendments or new Constitutions adopted in modes not provided for by the existing Constitutions cannot be recognized as legally valid unless they have received the formal approval of the old existing government. Thus, in the *case of the State of Rhode Island*, the old Constitution of which contained no provision for its own amendment, the President of the United States refused to recognize *de jure* a government established under a new Constitution which, without the approval of the old government, had been drawn up and adopted by a majority of the adult male citizens of that State. But, when, somewhat later, a new Constitution was adopted in accordance with provisions which the old government laid down and approved, it was, and has since been held a valid instrument both by the people of the State and by the National Government of the United States".[88]

1617. I think it might be open to the Amending Body to amend Article 368 itself and provide for referendum or any other method for ascertaining the will of the people in the matter of amendment of Fundamental Rights or any other provision of the Constitution. If the basic and essential features of the Constitution can be changed only by the people, and not by a constituted authority like the Amending Body, was it open to the Amending Body, or, would it be open to the Amending Body today to amend Article 368 in such a way as to invest the people with that power to be exercised by referendum or any other popular device? If counsel for the petitioner is right in his submission that the power to amend the amending power is limited, this cannot be done, for the Constitution would lose its identity by making such a radical change in the Constitution of the Amending Body, and, therefore, there would be implied limitation upon the power to amend the amending power in such a way as to change the locus of the power to amend from the Amending Body as constituted to any other body including the people. The result is that *ex-hypothesi*, under Article 368 there was, or is, no power to amend the Fundamental Rights and the other essential or basic features in such a way as to destroy or damage their essence of core. Nor can the article be amended in such a way as to invest the people—the legal sovereign according to counsel for the petitioner—with power to do it. This seems to me to be an impossible position.

---

[84] *See* Wheare, "*Modern Constitutions*", (1966) p. 62.
[85] *See* Rottschaefer on *Constitutional Law*, (1939) p. 8.
[86] Hoar, "*Constitutional Convention, Their Nature, Power and Limitations*", p. 115.
[87] *Ibid.*, p. 52.
[88] Willoughby, "*The Fundamental Concepts of Public Law*", p. 96.

1618. Counsel for the petitioner submitted that the Preamble to the Constitution would operate as an implied limitation upon the power of amendment, that the Preamble sets out the great objectives of the people in establishing the Constitution, that it envisages a sovereign democratic republic with justice, social, economic and political, liberty of thought, belief and expression, equality of status and opportunity and fraternity as its fulorums and that no succeeding generation can amend the provisions of the Constitution in such a way as to radically alter or modify the basic features of that form of Government or the great objectives of the people in establishing the Constitution. Counsel said that the Preamble cannot be amended as Preamble is not a part of the Constitution, and so, no amendment can be made in any provision of the Constitution which would destroy or damage the basic form of Government or the great objectives. The proceedings in the Constituent Assembly make it clear that the Preamble was put to vote by a motion which stated that the "Preamble stands part of the Constitution" and the motion was adopted.[89] Article 394 of the Constitution would show that the Preamble, being a part of the provisions of the Constitution, came into operation on the 26th of January, 1950, not having been explicity stated in the article that it came into force earlier. And there seems to be no valid reason why the Preamble, being a part of the Constitution, cannot be amended.

1619. A Preamble, as Dr. Wynes said, represents, at the most only an intention which an Act seeks to effect and it is a recital of a present intention.[90] In the *Berubari case*[91] it was argued that the Preamble to the Constitution clearly postulates that like the democratic republican form of Government, the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment, but the Court said: "it is not easy to accept the assumption that the first part of the Preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself". This case directly negatived any limitation of what is generally regarded as a necessary and essential attribute of sovereignty on the basis of the objectives enshrined in the Preamble.

1620. Story's view of the function of the Preamble, that it is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the Act or a Constitution is not in dispute. There is also no dispute that a Preamble cannot confer any power *per se* or enlarge the limit of any power expressly given nor can it be the source of implied power. Nor is it necessary to join issue on the proposition that in case of ambiguity of the enacting part, an unambiguous Preamble may furnish aid to the interpretation of the enacting part.

---

[89] See *The Proceedings of the Constituent Assembly*, dated October 17, 1949, Constituent Assembly Debates, Vol. X, p. 129.

[90] See Wynes, "*Legislative, Executive and Judicial Powers in Australia*", (4th Ed. 506).

[91] (1960)3 SCR 250, 281-282 : AIR 1960 SC 845 : 1960 SCJ 933.

1621. The broad concepts of justice, social, economic and political, equality and liberty thrown large upon the canvas of the Preamble as eternal varieties are mere moral adjurations with only that content which each generation must pour into them anew in the light of its own experience. An independent judiciary cannot seek to fill them from its own bosom as, if it were to do so, in the end it will cease to be independent. "And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs. It must be content to stand aside from these fateful battles "as to what these concepts mean and leave it to the representative of the people".[92]

1622. To Hans Kelsen, justice is an irrational ideal, and regarded from the point of rational cognition, he thinks there are only interests and hence conflict of interest. There solution, according to him, can be brought about by an Order that satisfies one interest at the expense of the other or seeks to achieve a compromise between opposing interests.[93] Allen said that the term "social justice" has no definite content that it means different things to different persons.[94] Of liberty, Abraham Lincoln said, that the world never has had a good definition of it. The concept of equality appears to many to be a myth and they say that if the concept is to have any meaning in social and economic sphere the State must discriminate in order to make men equal who are otherwise unequal. It does not follow that because these concepts have no definite contours, they do not exist, for, it is a perennial fallacy to think that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exists.[95] But for a country struggling to build up a social order for freeing its teeming millions from the yoke of poverty and destitution, the Preamble cannot afford any clue as to the priority value of these concepts *inter se*. Justice Johnson, with one of his flashes of insight, called the science of Government "the science of experiment".[96] And for making the experiment for building up the social order which the dominant opinion of the community desires, these Delphic concepts can offer no solution in respect of their priority value as among themselves. They offer no guide in what proportion should each of them contribute, or which of them should suffer subordination or enjoy dominance in that social order. How then can one of them operate as implied limitation upon the power of amendment when the object of the amendment is to give priority value to the other or others?

1623. Mr. Palkhivala in elaborating his submission on implied limitations said that in a Constitution like ours there are other essential features besides the Fundamental Rights, namely, the sovereignty and integrity of India, the people's right to vote and elect their representatives to Parliament or State Legislatures, the republican form of Government, the secular

---

[92] *See* Learned Hand, "*The Spirit of Liberty*", p. 125.

[93] *See* Kelsen, "*General Theory of Law and State*" (1946), p. 18.

[94] Allen, "*Aspects of Justice*", p. 31.

[95] *See* Lord Reid in *Ridge* v. *Baldwin*, 1964 AC 40, 64.

[96] See *Anderson* v. *Dunn*, 6 Wheat 204; 206 US 1821.

State, free and independent judiciary, dual structure of the Union, separation of the executive, legislative and judicial powers, and so on, and for changing these essential features, the Parliament being a constituted authority, has no power.

1624. Whenever the question of implied limitation upon the power of amendment was raised in the U. S. A. the Supreme Court has not countenanced the contention.

1625. In *Leser* v. *Garnett*[97] the U. S. Supreme Court upheld the validity of the 19th Amendment, rejecting the contention that the power of amendment conferred by the federal Constitution did not extend to that amendment *because of its character* as so great an addition to the electorate, if made without the State's consent, *destroys its autonomy as a political body*. In *U. S.* v. *Sprague*,[98] the Supreme Court rejected the Constitution that an amendment, conferring on the United States, power over individuals, should be ratified in conventions instead of by State Legislatures. The argument before the Court was that although Congress has absolute discretion to choose the one or the other mode of ratification, there was an implied limitation upon that discretion when rights of individuals would be directly affected and that in such a case the amendment must be ratified by convention. The Court said that there was no limitation upon the absolute discretion of the Congress to have the amendment ratified either by conventions or State Legislatures. In the *National Prohibition Cases*[99] which upheld the validity of the 18th Amendment to the United States Constitution, the Supreme Court brushed aside the argument that there are implied limitations upon the power of amendment. Although the majority judgment gave no reasons for its conclusion, it is permissible to look at the elaborate briefs filed by counsel in the several cases and the oral arguments in order to understand what was argued and what was decided.[1] The arguments advanced in *National Prohibition Cases*[2] before the Supreme Court were that an amendment is an alteration or improvement of that which is already contained in the Constitution, that the Amendment was really in the nature of a legislation acting directly upon the rights of individual, that since the Constitution contemplated an indestructible Union of States, any attempt to change the fundamental basis of the Union was beyond the power delegated to the Amending body by Article V and that the Amendment invaded the police power which inherse in the States for protection of health, safety and morals of their inhabitants. The only inference to be drawn from the Court upholding the validity of the Amendment is that the Court did not countenance any of the arguments advanced in the case.

1626. The result of the *National Prohibition Cases*[3] seems to be that there is no limit to the power to amend the Constitution except that a State may not be deprived of its equal suffrage in the Senate. This means that by action of two-third of both Houses of Congress and of the Legislatures in three-fourth of the States, all the powers of the national Government could be surrendered to the States and all the reserved powers of the States could be transferred to the Federal Government.[4]

---

[97] 258 US 130, (*Emphasis added*).

[98] 282 US 716.

[99] See *Rhode Island* v. *Palmer*, 253 US 350.

[1] See *U. S.* v. *Sprague*, 282, US 716, 733.

[2] See *Rhode Island* v. *Palmer*, 253 US 350.

[3] *Ibid.*

[4] *See* Burdick, "*The Law of the American Constitution*" pp. 44-49.

1627. Dodd, speaking about the effect of the decision of the Supreme Court in *National Prohibition Cases* (supra) said that the Court has necessarily rejected substantially all of the arguments presented in favour of the implied limitations upon the amending power, although this statement does not necessarily go to the extent of denying all limitations other than those clearly expressed in the constitutional language itself.[5]

1628. Article V of Constitutition prohibits any amendment by which any State "without its consent shall be deprived of its equal suffrage in the Senate". Beyond this there appears to be no limit to the power of amendment. This, at any rate is the result of the decision in the so-called *National Prohibition Cases*."[6]

1629. In *Schneiderman* v *U.S.*[7] Justice Murphy, after referring to *National Prohibition cases* (supra)said that Article V contains procedural provisions for Constitutional change by amendment without any present limitation whatsoever except that relating to equal suffrage in the Senate.

1630. In *U. S.* v. *Dennis*[8]. Learned Hand was of the opinion that any amendment to Constitution passed in conformity with the provision in Constitution relating to amendments is as valid as though the amendment had been originally incorporated in it, subject to the exception that no State shall be denied its equal suffrage in the Senate.

1631. The latest authority is the *obiter dictum* of Douglas, J., for the majority of the Supreme Court in *Whitehill* v. *Elkins*[9]:

> "If the Federal Constitution is our guide, a person who might wish to 'alter' our form of government may not be cast into the outer darkness. For the Constitution prescribes the method of 'alteration by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered."

1632. Perceptive writers on the Constitution of the U. S. A. have also taken the view that there are no implied limitations whatever upon the power of amendment, that an amendment can change the dual form of government or the Bill of Rights and that the framers of the Constitution did not intend to make an unalterable framework of Government in which only the minor details could be changed by amendment.[10]

1633. In *Ryan's Case*,[11] the Supreme Court of Ireland had occasion to discuss and decide two questions; the meaning to be given to the word 'amendment' in Article 50 of the Irish Constitution which provided for the amendment of the Constitution and (2) whether there are any implications to be drawn from the Constitution which would cut down the scope of the amendment which could be made under Article 50. I have already dealt with the decision in the case with respect to the first point.

---

[5] *See* 60 Yale Law Journal 329.

[6] *See* Thomas M. Colley, "*The General Principles of Constitutional Law in the USA*", 4th ed., pp. 46-47.

[7] 320 US 118, 137-145.

[8] 183 Federal Reporter 2d. 201.

[9] (1967) 389 US 54, 57.

[10] *See* Willis, "*Constitutional Law*" (1936), pp. 123-124; Orfield, "*The Amending of the Federal Constitution*" (1942), p. 99; Livingstone, "*Federalism and Constitutional Change*" (1956), pp. 240-241; Rottschaefer, "*Constitutional Law*", pp. 8-9; John W. Burgess, "*Political Science and Comparative Constitutional Law*", Vol. I, p 153; Cooley, "*Constitutional Limitations*", pp. 41-43; D. O. McGovney, "*Is the Eighteenth Amendment Void Because of Its Contents?*" Columbia Law Review, Vol. 20, May, 1929, No. 5; WF Codd, "*Amending the Federal Constitution*", 30 Yale Law Journal 329; W. W. Willoughby, *Constitutional Law of the United States*", 2nd ed., Vol. 1, 598.

[11] *(1935) Irish Reports, 170.*

1634. As regards the second point, Kennedy, C. J., was of the opinion that there were certain implied limitations upon the power of amendment while the other two learned judges held that there were no such limitations. However, it is not necessary to deal with the suggested implied limitations relied on by the learned Chief Justice in the light of his observation: "the only argument advanced in support of this position is that the power to amend the Constitution gives power to amend the power itself. It certainly does not say so. One would expect (if it were so intended) that the power would express that intention by the insertion of a provision to that effect by some such words as "including amendment of this power of amendment", but no such intention is expressed and there is nothing from which it can be implied. There might be some justification for the view of Kennedy, C. J., that a "power of amending a Constitution is something outside and collateral to the Constitution itself" and that unless there is express power to amend the amending power, the amending power cannot be enlarged. Alf Ross, the Scandinavian Jurist, has said that in the United States the highest authority is the constituent power constituted by the rules in Article V of the Constitution. These rules embody the highest ideaological presupposition of the American Law system. But they cannot be regarded as enacted by any authority and they cannot be amended by any authority. Any amendment of Article V of the Constitution which, in fact, is carried out, is an *a-legal* fact and not the creation of law by way of procedure that has been instituted.[12] Now, whereas Article 50 of the Irish Constitution did not contain any power to amend that article, proviso (*e*) of Article 368 makes it clear that Article 368 itself can be amended and so, the whole line of the reasoning of Kennedy, C. J., has no relevance for our purpose. It is interesting to note that in *Moore* v. *Attorney-General for the Irish State*[13] where the Constitutional amendment made by the Irish Parliament in 1933 (Amendment No. 22) was challenged, Mr. Green conceded before the Privy Council that Amendment No. 16 of 1929 [the amendment challenged in *Ryan's case* (supra)] was regular. The validity or otherwise of Amendment No. 16 was vital for the success of his client's case and the concession of counsel was, in their Lordships' view, "rightly" made.

1635. The decision of the Privy Council in *Liyanage* v. *the Queen*[14] was relied on by the petitioner to show that there can be implied limitation upon legislative power. The question for consideration in that case was whether Criminal Law (Special Provisions) Act No. 1 of 1962 passed by Parliament of Ceylon was valid. The Act purported *ex post facto* to create new offences and to alter the rules of evidence and the criminal procedure obtaining under the general law at the time of the commission of the offence and also to impose enhanced punishment. The appellants contended that the Act was passed to deal with the trial of the persons who partook in the abortive coup in question and the arguments before the Privy Council were that the Act of 1962 was contrary to fundamental ptinciples of justice in that it was directed against individuals, that it *ex post facto* created crimes and their punishments, and that the Act was a legislative plan to secure the conviction of these individuals and this constituted an usurpation of the judicial power by the Legislature.

---

[12] Alf Ross, "*Law and Justice*", p. 81.

[13] (1935) AC 484.

[14] (1967) 1 AC 259.

1636. The Privy Council rejected the contention that the powers of the Ceylon Legislature could be cut down by reference to vague and uncertain expressions like fundamental principles of British Law, and said that although there are no express provisions in the Ceylon Constitution vesting judicial power in the judiciary, the judicial system in Ceylon has been established by the Charter of Justice of 1833, that the change of sovereignty did not produce any change in the functioning of the judicature, that under the provisions of the Ceylon Constitution there is a broad separation of powers and that, generally speaking, the Legislature cannot exercise judicial power in spite of the difficulty occasionally felt to tell judicial power from legislative power. Ever since the days when John Locke wrote his "*Second Treaties on Civil Government*"[15], it was considered axiomatic that the legislative power does not include judicial power. And I think what the Privy Council said in effect was that the power to pass a law for peace, order, or good government under Section 29(1) of the Constitution of Ceylon would not take in a power to settle a controversy between Richard Doe and John Doe in respect of Black Acre and label it a law. It is a bit difficult to see how the doctrine of implied limitation has anything to do with the well understood principle that the power to pass law would not include judicial power.[16]

1637. Nor am I able to understand how the doctrine of implied limitations can draw any juice for its sustenance from the fact that President or Governor is bound to act according to the advice of the Council of Ministers, although the expression "aid and advise" taken by itself, would not denote any compulsion upon the President or Governor to act according to the advice. The expression, when it was transplanted into our Constitution from the English soil, had acquired a meaning and we cannot read it divested of that meaning.

1638. The doctrine of implied limitation against the exercise of a power once ascertained in accordance with the rules of construction was rejected by the Privy Council in *Web* v. *Outrim*.[17]

1639. Counsel for the petitioner relied on certain Canadian cases to support his proposition that there are implied limitations upon the power of amendment. In *Alberta Press case*,[18] Chief Justice Sir Lyman P. Duff said that the British North America Act impliedly prohibits abrogation by provincial Legislatures of certain important civil liberties. He said that the reason was that the British North America Act requires the establishment of one Parliament for Canada and since the term 'Parliament' means, when interpreted in the light of the preamble's reference to "a Constitution similar in principle to that of the United Kingdom", a legislative body elected and functioning in an atmosphere of free speech, and that a legislation abrogating freedom of speech in a particular province would be an interference with the character of the federal Parliament, and therefore, ultra vires the provincial Legislature. This dictum logically involves a restriction of the powers of the dominion

---

[15] *See* the Chapter, "*Of the Extent of Legislative Power*".

[16] As to the distinction between legislative power and judicial power, *see* the observation of Holmes in *Prentis* v. *Atlantic Coast Line Co.*, (1908) 211 US 210.

[17] (1907) AC 81 (PC).

[18] (1938)2 DLR 81.

Parliament also as was pointed out by Abbott, J., in the *Padlock Law case.*[19] In that case, he expressed the view, although it was not necessary so to decide, that Parliament itself could not abrogate the right of discussion and debate since the provisions of the British North America Act are as binding on Parliament as on the provincial Legislatures.

1640. In *Seumur* v. *City Quebec,*[20] the preamble of the British North America Act was referred to as supporting the constitutional requirement of the religious freedom especially by Rand, J. The basic issue in that case was whether or not the Provinces had legislative authority to enact laws in relation to the religious freedom, and whether the City of Quebec was justified by one of its bye-laws under a Provincial Act from prohibiting the distribution of booklets etc. in the streets without the written permission of the Chief of Police. The petitioner, a member of Jehovah's Witnesses contended that the right to distribute booklets was guaranteed by the statement in the preamble to the British North America Act and that freedom of religion was secured by the Constitution of the United Kingdom, and that fundamental principles of that Constitution were made a part of the Canadian Constitution by implication of the preamble and accordingly the impugned Quebec bye-law was null and void. This contention was rejected by a majority of the Court. Rinfret, C. J., Taschereau, J. concurring, stated that the Privy Council, on several occasions had declared that powers distributed between Parliament and the Legislatures covered absolutely all the powers which Canada could exercise as a political entity. Kerwin, J., stated that the British North America Act effected a complete division of legislative powers. Cartwright, J., (Fauteux, J., concurring) went even further. He said that there were no rights possessed by the citizens of Canada which could not be modified by either Parliament or the Legislatures of the Provinces. Rand, J., found some support in the preamble for freedom of speech, but did not mention freedom of religion in this context. Estey and Locke, JJ., quoted the preamble, but did not indicate what conclusion they derived from it.

1641. It should be noted the view that neither the provinces nor the dominion Parliament could legislate on civil liberties so as to affect them adversely is contrary to the view of the Privy Council that no topic of internal self-Government was withheld from Canada. "It would be subversive of the entire scheme and policy of the Act to assume that any topic of internal self-Goverement was withheld from Canada".[21]

1642. The main objection however to the proposition that the British North America Act contains an implied bill of rights is that it is inconsistent with the doctrine of parliamentary supremacy. If the Constitution is similar in principle to that of Great Britain, it must follow that the Legislature is supreme as that is the fundamental law of the British Constitution. Therefore, no subject would be beyond the legislative competence of both Parliament and provincial Legislatures. Whether there are any implied limitations upon the power of Parliament or not, it is clear that the dictum of Abbott, J., in *Switzman's case* (supra) is based on no high authority as there is nothing in the British North America Act to indicate that civil liberties are beyond the legislative reach of the Parliament and the provincial Legislatures. There was no express guarantee of civil liberties in the British North America Act, nothing comparable to the Bill of Rights in the American Constitution or to the Fundamental Rights under our Constitution.

---

[19] See *Switzman* v. *Elbling,* (1957) 7 DLR 337.

[20] (1953) 4 DLR 641.

[21] *A. G. Ontario* v. *A. G. Canada,* (1912) AC 571.

1643. It is, however, impossible to see the relevance of these dicta so far as the interpretation of Article 368 is concerned as none of these cases are cases relating to implied limitation on the power of amendment of any Constitution. They are cases on the legislative competence of legislatures to affect civil liberties. The Canadian Bill of Rights, 1960, makes it clear that Parliament of Canada can dispense with the application of the Canadian Bill of Rights in respect of any legislation which it thinks proper. Section 2 of the Canadian Bill of Rights provides:

> "2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared, and in particular, no law of Canada shall be construed or applied so as to. ...."

1644. Nor is there anything in the actual decision of the Privy Council in *Re the Initiative and Referendum* Act[22] to show that there are implied limitations upon the power to amend any provision of the Constitution. The only point decided in that case was that in the absence of clear and unmistakable language in Section 92(1) of the British North America Act, 1867, the power of the Crown possessed through a person directly responsible to the Crown cannot be abrogated. That was because Section 92(1) provides for an express exception to the power of amendment and that the Act in question, on a true construction of it, fell within the exception. The case is an authority only as to the true meaning of the expression "excepting as regards the office of Lieutenant Governor" in Section 92(1) of the aforesaid Act. I am not concerned with the obiter dictum of Lord Haldane to the effect that a provincial Legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence".

1645. However, it is relevant in this context to refer to the comment of Bora Laskin on the obiter dictum of Lord Haldane in the above case; "This oft-quoted passage remains more a counsel of caution than a constitutional limitation". He then read the above passage and continued: "This proposition has in no way affected the widest kind of delegation by Parliament and by a provincial Legislature to agencies of their own creation or under their control; see *Reference re Regulations (Chemicals)*, (1943) 1 DLR 248; *Shannon* v. *Lower Mainland Dairy Products* Board, (1938) AC 708".[23]

1646. Reference was made by counsel for the petitioner to *Taylor* v. *Attorney General of Queensland*[24] as authority for the proposition that power of amendment can be subject to implied limitation. The questions which the Court had to consider in the case were: (1) Was the Parliamentary Bills Referendum Act of 1908 a valid and effective Act of Parliament? and (2) Was there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the Parliamentary Bills Referendum Act of 1908? These Acts did not alter the 'representative' character of the Legislature as defined in Section 1 of the Colonial Laws Validity Act, 1865, nor did they affect the position of the Crown. Therefore, the question whether the representative character of the Legislature could be changed, or the Crown eliminated did not call for decision. This will be clear from the observations of Gavan Duffy and Rich, JJ., at p. 477.

---

[22] (1919) AC 935, 945.

[23] *See* Canadian Bar Review, Vol. XXXIV (1956), footnote on p. 919.

[24] 23 CLR 457.

1647. The judgment of Issacs, J., shows that the opinion expressed by him as regards the "representative" character of the Legislature is based on the meaning to be given to the expression 'Constitution of such Legislature' on a true construction of Section 5 of the Colonial Laws Validity Act. Isaacs, J., held that the word 'Legislature' did not include the Crown. Having reached this conclusion on the express language of the Colonial Laws Validity Act, he made the observation:

> "When power is given to a colonial Legislature to alter the Constitution of the Legislature, that must be read subject to the fundamental conception that consistently with the very nature of our Constitution as an Empire, the Crown is not included in the ambit of such power."

1648. These observations are made in the context of the provisions of the Colonial Laws Validity Act where a "colony" is defined to include "*all* of Her Majesty's possessions abroad in which there shall exist a Legislature, as hereinafter defined, except the Channel Islands, the Isle of Man". The observation of Isaacs, J., can only mean that when power to alter the Constitution of the Legislature is conferred upon a colony which is a part of Her Majesty's possessions abroad (the Empire), it is reasonable to assume that such power did not include the power to eliminate the Queen as a part of a colonial Legislature. It is to be noted that Isaacs, J., had arrived at that conclusion on the true construction of the Colonial Laws Validity Act, namely, that the word 'Legislature' did not include the Crown.

1649. *Mangal Singh* v. *Union of India*,[25] was also relied on as authority for the proposition that the power of amendment is subject to implied limitation. The only question which was considered in that case was that when by a law made under Article 4 of the Constitution, a State was formed, that State should have the legislative, executive and judicial organs, the Court said:

> "..............Power with which the Parliament is invested by Articles 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise "by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and not power to override the constitutional scheme. No State can therefore be formed, admitted, or set up by law under Article 4 by the Parliament which has not effective legislative, executive and judicial organs."[26]

1650. I am unable to understand how this case lends any assistance to the petitioner for it is impossible to imagine a modern State without these organs.

1651. Section 128 of the Australian Constitution Act provides for alteration of that Constitution. There are certain restrictions upon the power of amendment. We are not concerned with the controversy whether those restrictions can be taken away in the exercise of the power of amendment, as proviso(s) of Article 368 makes it clear that the amending power itself can be amended. Leading writers on the Constitution of Australia have taken the view that there are no other limitations upon the power of alteration and that all the provisions of the Constitution can be amended.[27]

---

[25] (1967)2 SCR 109: AIR 1967 SC 944: (1968)1 SCJ 240.

[26] (1967)2 SCR 109, 112: AIR 1967 SC 944: (1968) 1 SCJ 240.

1652. Reference was made to the case of *Victoria* v. *Commonwealth.*[28] In support of the proposition that there are implied limitations upon the power of Commonwealth Parliament in Australia and therefore, there could be implied limitation upon the power of amendment. They pay roll tax imposed by the Pay Roll Tax Act, 1941 (Com.) was, according to the Pay Roll Tax Assessment Act, 1941-69, to be levied and paid or payable by any employer. Section 3(1) of the Pay Roll Tax Assessment Act defined 'employer' to include the Crown, in the right of a State. The State of Victoria sought declaration that it was beyond the legislative competence of the Commonwealth to levy tax on wages paid by the Crown in the right of the State to officers and employees in the various departments. Menzies, Windeyer, Walsh and Gibbs, JJ., held that there was implied limitation on Commonwealth legislative power under the Constitution, but the Act did not offend such limitation. Barwich, C. J., and Owen, J., held that a law which in substance takes a State or its power or functions of government as its subject-matter is invalid because it cannot be supported upon any granted legislative power, but there is no implied limitation on Commonwealth legislative power under the Constitution arising from the federal nature of the Constitution. McTiernan, J., held that there was no necessary implication restraining the Commonwealth from making the law.

1653. As to the general principle that non-discriminatory laws of the Commonwealth may be invalid in so far as they interfere with the performance by the States of their constitutional functions, it must be noted that that is not claimed to rest on any reservation made in the *Engineer's case*[29] itself to the general principle it advanced. It must also be noted that Menzies, Walsh and Gibbs, JJ., were not prepared to formulate the proposition as a single test in precise and comprehensive terms and that they were alive to the great difficulties which would be encountered in the formulation.

1654. If there are difficulties in formulating an appropriate test, is it not legitimate to ask whether the proposed principle is one that is capable of formulation? It is not legitimate to ask whether there is a judicially manageable set of criteria available by which the proposed general principle may be formulated? The theory of the implied limitation propounded might invite the comment that "it is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact". It is difficult to state in clear terms from the judgments of those judges as to what kind of legislative action by the Commonwealth will be invalid because of the application of the general principle.

---

[27] *See* A. P. Canaway, K. C., *The Safety Valve of the Commonwealth Constitntion,* Australian Law Journal, Vol. 12 (1938-39), p 108 at 109; A. P. Canaway, K.C. (N. S. W.) *The Failure of the Federalism in Australia,* Appendix; Power to Alter the Constitution, A Joint Legal Opinion, p. 211; John Quick and Robert Rondolph Garran, *Annotated Constitution of the Australian Commonwealth,* pp. 988-9; W. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia,* Third Ed. pp. 695-698; Colin Howard *Australian Federal Constitutional Law,* (1968).

[28] 45 Australian Law Journal, 251.

[29] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.,* (1920) 28 CLR 129.

1655. The stated purpose of the general principle is to protect the continued existence and independence of the States. Do the judgments of Menzies, Walsh and Gibbs, JJ., disclose any reason why that existence and independence of the States will be threatened in the absence of the implied general principle?

1656. Windeyer, J.'s judgment is a little uncertain. He said that once a law imposes a tax it is a law with respect to taxation and that if it is invalid it must be for reasons that rest on other constitutional prohibitions, e. g., an implied prohibition on a tax discriminating against a State. However, many cases arise in which competing possible characterizations of a Commonwealth law are possible; on one characterization it is valid, on another it is invalid. The Courts, when faced with competing possible characterizations, may not hold a law valid because one possible characterization is that the law is with respect to one of the enumerated heads of legislative power.

1657. Windeyer, J., said that a law of the Commonwealth which is directed against the States to prevent their carrying out of their functions, while it may be with respect to an enumerated subject-matter, is not for the peace, order and good government of the Commonwealth.

1658. The basic principle of construction which was definitely enunciated by the Court was that adopted by Lord Selborne in *Queen* v *Burah.*[30] The judges who took the view that there was implied limitation on the power of Commonwealth to aim their legislation against the State did not differ in substance from the theory propounded by Barwick, C. J., and Owen, J., who said that it is a question of lack of power as the legislation is not with respect to a subject within the power of taxation conferred by Section 51 of Australian Constitution.[31]

1659. I am unable to understand the relevancy of this decision. In a federal or quasi-federal State, the continued existence of the federated States, when the Constitution exists, is a fundamental pre-supposition and the legislative power of the federal Legislature cannot be exercised in such a way as to destroy their continued existence. But when we are dealing with an amending power, is there any necessity to make that fundamental assumption? There might be some logic in implying limitation upon the legislative power of the federal Legislature, as that power can be exercised only subject to the fundamental assumption underlying a federal State, namely, the continued existence of States. But what is its relevancy when we are dealing with implied limitation on the amending power, which is a power to alter or change the Constitution itself?

1660. It is relevant in this connection to note the vicissitudes in the fortune on the doctrine of immunity of instrumentalities which was based on the theory of implied prohibition. Marshal, C. J., said in *Mc Culloch* v. *Maryland*:[32] "The rule thus laid down was based upon the existence of an implied prohibition that, the Federal and States Governments respectively being sovereign and independent, each must be free from the control of the other; the doctrine was thus based upon the necessity supposed to arise in a federal system". The progressive retreat from the doctrine in its original

[30] (1878)3 AC 889.

[31] *See* generally Fajgenbaum and Hanks, *Australian Constitutional Law* (1972), pp. 576-580.

[32] (1819)4 Wheaten 316.

fom has been traced by Dixon, J., in *Essendon Corporation* v. *Criterion Theatres.*[33] He said:

> "The shifting of judicial opinion shown in the foregoing formed a prelude to the decision of the Court in *Graves* v. *New York* 306 US 466 where the Court thought it imperative to "consider anew the immunity........ for the salary of an employee of a Federal instrumentality (at p. 485) from State Income tax and decided that there should be immunity". Frankfurter, J. remarked: "In this Court dissents have gradually become majority opinions and even before the present decision the rationale of the doctrine had been undermined" (at p. 491). This case marked the end of the old doctrine".

1661. I would add that the theory of immunity of instrumentalities was definitely rejected by this Court in *State of West Bengal* v. *Union of India.*[34]

1662. Mr. Palkhivala argued with considerable force that if there are no limitations upon the power of amendment, the consequences would be far reaching. He said that it will be open to the Parliament to prolong the period of its existence, to make India a satellite of a foreign country, do away with the Supreme Court and the High Courts, abolish the Parliamentary system of Government and take away the power of amendment or, at any rate, make the exercise of the power so difficult that no amendment would be possible. As I said there is no reason to think that the word 'amendment' was used in any narrow sense in Article 368 and that the power to amend under the article was in any way limited. If there is power, the fact that it might be abused is no ground for cutting down its width.

1663. In *Vacher and Sons* v. *London Society of Compositors*[35] Lord Atkinson said that it is well established that, in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them. In the same case, Lord McNaughton said that a judicial tribunal has nothing to do with the policy of any Act and that the duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction.

1664. In *Bank of Toronto* v. *Lambe,*[36] the Privy Council was concerned with the question whether the Legislature of a Province could not levy a tax on capital stock of the Bank, as that power may be so exercised as to destroy the Bank altogether. The Privy Council said that if on a true construction of Section 92 of the British North America Act, the power fell within the ambit of the section, it would be quite wrong to deny its existence because by some possibility that it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. The Privy Council observed that "Their Lordships cannot conceive that when

---

33. (1947) 74 CLR 19-22.
34. (1964) 1 SCR 371: AIR 1963 SC 1241.
35. (1913) AC 107, at p. 121 & 118.
36. (1887) 12 AC 575, 586.

SCC Online Edition

the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy a tax".

1665. In *Ex-parte Crossman*,[37] it was held that the presumption is that every organ of a State will act in co-ordination, that though one organ can, by its action, paralyse the functions of the other organs and make the Constitution come to a standstill, yet no Constitution proceeds on the assumption that one organ will act in such a way as to defeat the action of the other.

1666. Our Constitution, in its preamble has envisaged the establishment of a democratic sovereign republic. Democracy proceeds on the basic assumption that the representatives of the people in Parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence re-posed in them by the people. Some of the great powers appertaining to the sovereignty of the State are vested in the representatives of the people. They have the power to declare war. They have power over coinage and currency. These disaster-potential powers are insulated from judicial control. These powers, if they are imprudently exercised, can bring about consequences so extensive as to carry down with them all else we value. War and inflation have released evil forces which have destroyed liberty. If these great powers could be entrusted to the representatives of the people in the hope and confidence that they will not be abused, where is the warrant for the assumption that a plenary power to amend will be abused? The remedy of the people, if these powers are abused, is in the polling booth and the ballot box.

1667. The contention that if the power to amend Fundamental Rights in such a way as to take away or abridge them were to vest in Parliament, it would bring about the catastrophic consequences apprehended by counsel has an air of unreality when tested in the light of our experience of what has happend between 1951 when *Sankari Prasad's case*,[38] recognised the power of the Parliament to amend the Fundamental Rights and 1967 when the *Golaknath's case*[39] was decided. It should be rememberded in this connection that the Parliament when it exercises its power to amend Fundamental Rights is as much the guardian of the liberties of the people as the Courts.

1668. If one of the tests to judge the essential features of the Constitution is the difficulty with which those features can be amended, then it is clear that the features which are broadly described as "federal features" contained in clauses (*a*) to (*d*) of the proviso to Article 368 are essential features of the Constitution. The articles referred to in clauses (*a*) to (*d*) deal with some of the essential features of the Constitution like the Union Judiciary, the High Courts, the legislative relation between the Union and the States, the conferment of the residual power and so on. The power to amend the legislative lists would carry with it the power to transfer the residuary entry from the Union List to the State List. This would also enable Parliament to increase its power by transferring entries from the State List or Concurrent List to the Union List. The proviso to Article 368 thus makes it clear that the Constitution-makers visualised the amendability of the essential features of the Constitution.

---

[37] 267 US 120, 121.

[38] 1952 SCR 89 : AIR 1951 SC 458 : 1951 SCJ 775.

[39] (1967)2 SCR 762 : AIR 1967 SC 1643 : (1967)2 SCJ 486.

1669. Mr. Palkhivala contended that Fundamental Rights are an essential feature of the Constitution, that they are the rock upon which the Constitution is built, that, by and large, they are the extensions, combinations or permutations of the natural rights of life, liberty and equality possessed by the people by virtue of the fact that they are human beings and that these rights were reserved by the people to themselves when they framed the Constitution and cannot be taken away or abridged by a constituted authority like Parliament. He said that the implied limitation stems from the character of those rights as well as the nature of the authority upon which the power is supposed to be conferred.

1670. On the other hand, the respondents submitted that the people of India have only such rights as the Constitution conferred upon them, that before the Constitution came into force, they had no Fundamental Rights, that these rights were expressly conferred upon the people by Part III of the Constitution and that there is no provision in our Constitution like Article 10 of the United States Constitution which reserved the rights of the people to themselves. They also said that the chraracterization of Fundamental Rights as transcendental, sacrosanct, or primordial in the sense that they are "not of today or yesterday but live eternally and none can date their birth" smacks of sentimentalism and is calculated to cloud the mind by an out-moded political philosophy, and would prevent a dispassionate analysis of the real issues in the case.

1671. The question presented for decision sounds partly in the realm of political philosophy but that is no reason why the Court should not solve it, for, as De Tocqueville wrote: "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial questlon".[40] For the purpose of appreciating the argument of Mr. Palkhivala that there is inherent limitation on the power of Parliament to amend Fundamental Rights, it is necessary to understand the source from which these rights arise and the reason for their fundamentalness.

1672. Let it be understood at the very outset that I mean by 'natural rights' those rights which are appropriate to man as a rational and moral being and which are necessary for a good life. Although called 'rights', they are not per se enforceable in Courts unless recognized by the positive law of a State. I agree that the word 'right' has to be reserved for those claims and privileges which are recognized and protected by law. But to identify rights with legally recognized rights is to render oneself helpless before the authoritarian State. Your rights, on this theory, are precisely those which the State provides you and no more. To say that you have rights which the State ought to recognize is, from this point of view, a plain misuse of the language. "However from the point of view of the Declaration of Independence, to recognize the existence of rights prior to and independent of political enactment, is the beginning of political wisdom. If the governments are established to 'secure these rights', the pre-existence of these rights is the whole basis of the political theory".[41] The preamble to our Constitution shows that it was to 'secure' these rights that the Constitution was established, and that, by and large, the Fundamental

---

[40] *See* De Tocquevilla, *Democracy in America* (1948), Bradlay ed., p. 280.

[41] *See* Hocking, *Freedom of the Press* footnote at p. 59.

Rights are a recognition of the pre-existing natural rights. "They owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded complete".[42]

1673. The philosophical foundation of the rights of man is natural law and the history of rights of man is bound up with the history of natural law.[43] That law is deduced not from any speculative void but from the general condition of mankind in society. According to St. Thomas Aquinas the order of the precepts of the natural law follows the order of natural inclinations, because, in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and the warding off its obstacles, belongs to the natural law.[44] In a different context Spinoza proclaimed the very same principle in his famous words "Every, being strives to persevere in being".[45] Secondly, according to St. Thomas Aquinas, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in·common with other animals: and in virtue of this inclination, those things are said to belong to the natural law *which nature has taught to all animals*, such as sexual intercourse, the education of the off spring and so forth.[46] And thirdly, there is in man an inclination to good according to the nature of his reason which inclination prompts him to know the truth and to live in society.

1674. The law of nature is both an expression of reality and a standard to measure the rightness and justice of positive law. The influence of natural law on the concept of natural justice and of the reasonable man of the common law, on the conflict law, the law of merchants and the law of quasi-contract, with special reference to the common law of India has been traced with great learning by Sir Frederic Pollock in his essay on the "*History of the Law of the Nature.*"[47]

1675. It is true that law of nature has incurred the charge of being fanciful and speculative and several of the theories advanced in support of natural law have been discredited. Mr. Max M. Laserson has rightly said that the doctrines of natural law must not be confused with natural law itself. The doctrines of natural law, like any other political and legal doctrines, may propound various arguments or theories in order to substantiate or justify natural law, but the overthrow of these theories cannot signify the overthrow of natural law itself, just as the overthrow of some theory of philosophy of law does not lead to the overthrow of law itself.[48]

1676. The social nature of man, the generic traits of his physical and mental constitution, his sentiments of justice and the morals within, his instinct for individual and collective preservation, his desire for happiness, his sense of human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence.[49] The law of nature is not, as the English utilitarians in their ignorance of its history supposed, a synonym for arbitrary individual preference, but that on the contrary, it is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the Common Law in substance though not always by name.[50] "The sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power".[51]

---

[42] *See* Corwin *The Higher Background of the American Constitutional Law*, p. 5.

[43] *See* Jacques Maritain; *Man and the State*, pp. 80-81.

[44] See *Summa Thealogica*, Part II, Section I, Question 91, Article 2 (translated by the English Dominicans), Vol. 3.

[45] *See Ethics*, Part III, Proposition No. 6.

[46] See *Summa Theologic*, Part II, Section 1, Question 91, Article 2(Translated by the English Dominicans), Vol. 3.

[47] *See Essays in Law*, p. 31.

[48] *See Positive and Natural Law and their correlation in Interpretation of Modern Legal Philosophies* Essays in Honour of Rosoe Pound (New York Oxford University Press) (1947).

1677. In *State of West Bengal* v. *Subodh Gopal*,[52] Patanjali Sastri, J., said that article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country.

1678. In the United States of America, reliance upon natural law on the part of vested interests inimical to the economic freedom of man was destined to prove a persistent feature in the 19th century. In the second half of the 19th century, the ideas of natural law and of natural rights were resorted to in an attempt to curb State interference with rights of private property and freedom of contract. The ideas of natural law and natural rights were revived and endowed with fresh vigour for that puspose.[53] By reference to natural rights of man, Courts in the United States often declared to be unconstitutional legislation for securing humane conditions of work, for protecting the employment of women and children, for safeguarding the interests of consumers, and for controlling the powers of trusts and corporations. *This past history explains why natural rights* have been regarded in some quarters with suspicion and why writers affirming the supremacy of a higher law over the Legislature or the Constitution have spoken with impatience of the *damnosa haereditas* of natural rights. This idea of natural law in defence of causes both paltry and iniquitous has caused many to reject it with impatience. A great practical reformer like Jeremy Bentham, a great judge like Mr. Justice Holmes and a great legal philosopher like Hans Kelson —all believers in social progress—have treated the law of nature with little respect and have rejected it as fiction. Mr. Justice Holmes remarked: "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere".[54] Professor Kelsen considers the typical function of the natural law school to have been the defence of established authority and institutions—of established governments, of private property, of slavery, of marriage.[55]

1679. Despite these attacks and the ebb and flow in its fortune, there has been a revival of the law of nature in the 20th century and there is no gainsaying the fact that the doctrine of the law of nature was the bulwark and the lever of the idea of the rights of man embodied in the International Bill of Human Rights with a view to make the recognition of these rights more effective and to proclaim to the world that no State should violate these rights.[56] Whether you call these rights, natural rights or not, whether they flow from the law of nature or not, as I said, these are rights which belong to man as a rational and moral being. "Man's only right, in the last analysis is the right to be a man, to live as a human person. Specific human rights are all based on man's right to live a human life".[57] Horold Laski said :[58]

---

[49] *See* Lauterpacht, *International Law and Human Rights*, p. 101.

[50] *See* Sir Frederic Pollock, *The Expansion of the Common Law* (1904), p. 128.

[51] *See* the passage quoted in *The History of Freedom and Other Essays* by Lord Action (1907), p. 587.

[52] 1954 SCR 587, 596: AIR 1954 SC 92. 1954 SCJ 127.

[53] *See* Haines, *The Revival of Natural Law Concepts*, pp. 117-123.

[54] Holmes, *Collected Legal Papers*, p. 312.

[55] *See* Kelsen, *General Theory of Law and State*, pp. 413-418.

> "I have rights which are inherent in me as a member of society; and I judge the State, as the fundamental instrument of society, by the manner in which it seeks to secure for me the substance of those rights ……Rights in this sense, are the groundwork of the State. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to good life."

1680. Mr. Seervai submitted that Article 33 of the Constitution which states that Parliament may, by law determine to what extent the Fundamental Rights, in their application to members of the Armed Forces or forces charged with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them, would show that no natural rights are recognised by our Constitution, as otherwise, the limitation on the exercise of the Fundamental Rights by Parliament would be unwarranted. In support of this position, he has relied upon the observations of S. K. Das, J., in *Basheshar Nath* v. *Commissioner of Income Tax, Delhi, etc.*[59] where he said:

> "There are, in my opinion, clear indications in Part III of the Constitution itself that the doctrine of "natural rights" had played no part in the formulation of the provisions therein. Take Articles 33, 34 and 35 which give Parliament power to modify the rights conferred by Part III. If they were natural rights the Constitution could not have given power to Parliament to modify them."

I do not think that it was the contention of Mr. Palkhivala that natural rights as such are enforceable by Courts without the backing of positive law or that they are not liable to be limited in certain circumstances.

1681. That all natural rights are liable to be limited or even taken away for common good is itself a principle recognized by all writers on natural law. "However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal Order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others".[60] And when the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. John Locke himself did not understand that natural rights were absolute and nowhere did he say so. In other words, because Parliament can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining peace by law, it does not follow that Fundamental Rights, by and large, are not a recognition of the basic human rights or that those rights are not liable to be limited by positive law for common good. Natural law cannot supplant positive law; positive law must provide the practical solution in the choice of one measure rather than another in a given situation. Sir Frederick Pollock said that natural justice has no means of fixing any rule to terms defined in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters. It would be no great feat for natural reason to tell us that a rule of the road is desirable; but it could never have told us whether to drive to the right hand or to the left, and in fact custom has settled this differently in different countries, and even, in some parts of Europe, in different provinces of one State.[61]

---

[56] *See* Lauterpacht, *International Law and Human Rights*, pp. 112-113.

[57] *See Weapons for Peace* by Thomas P. Neill, quoted in *The Natural Law* by Rommen, footnote at p. 243.

[58] Harold Laski, *Grammar of Politics* (New Haven) (1925), pp. 39-40.

[59] (1959) Supp 1 SCR 528, 605: AIR 1959 SC 149: (1959) 35 ITR 190.

[60] *See* Rommen, *The Natural Law* (1947), footnote 49, p. 243.

1682. Nor am I impressed by the argument that because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural rights. The fact that Constitution does not recognize them or enforce them as Fundamental Rights for non-citizens is not an argument against the existence of these rights. It only shows that our Constitution has chosen to withhold recognition of these rights as fundamental rights for them for reasons of State policy. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights suffers from the same fallacy, namely the natural rights have no limits or are available as immutable attributes of human person without regard to the requirement of the social order or the common good.

1683. Mr. Palkhivala contended that there are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free from any limitation. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. As no human being is an island, and can exist by himself, no human right, which has no intrinsic relation to the common good of the society can exist. Some of the rights like the right to life and to the pursuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are, to a certain extent, inalienable. Others like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them. They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise. They are subject to conditions and limitations dictated in each case by justice, or by considerations of the safety of the realm or the common good of the society. No society has ever admitted that in a just war it could not sacrifice individual welfare for its own existence. And as Holmes said, if conscripts are necessary for its army, it seizes them and marches them, with bayonets in their rear to death.[62] If a criminal can be condemned to die, it is because by his crime he has deprived himself of the possibility of justly asserting this right. He has morally cut himself off from the human community as regard this right.[63]

---

[61] *See* Pollock, *The Expansion of the Common Law* (1904), p. 128.

[62] See *Common Law*, p. 43.

1684. Perceptive writers have always taken the view that human rights are only *prima facie* rights to indicate that the claim of any one of them may be overruled in special circumstances. As I said the most fundamental of the pre-existing rights—the right to life—is sacrificed without scruple in a war. A *prima facie* right is one whose claim has *prima facie* justification, i. e., is justified unless there are stronger counter-claims in the particular situation in which it is made, the burden of proof resting always on the counter-claims. To say that natural rights human rights are *prima facie* rights is to say that there are cases in which it is perfectly just to disallow their claim. Unless we have definite assurance as to the limits within which this may occur, we may have no way of telling whether we are better off with these *prima facie* rights than we would be without it. "Considerations of justice allow us to make exceptions to a natural right in special circumstances as the same considerations would require us to uphold it in general".[64]

1685. Owing to the complexity of social relations, rights founded on one set of relations may conflict with rights founded on other relations. It is obvious that human reason has become aware not only of the rights of man as a human and civic person but also of his social and economic rights, for instance, the right of a worker to a just wage that is sufficient to secure his family's living, or the right to unemployment relief or unemployment insurance, sick benefits, social security and other just amenities, in short, all those moral rights which are envisaged in Part IV of the Constitution. But there was a natural tendency to inflate and make absolute, unrestricted in every respect, the familiar fundamental rights, at the expense of other rights which should counter-balance them. The economic and social rights of man were never recognised in actual fact without having had to struggle against and overcome the bitter opposition of the fundamental rights. This was the story of the right to a just wage and similar rights in the face of right to free mutual agreement and right to private ownership.

1686. To determine what is finallay right involves a balancing of different claims. From an ethical point of view, all one can say is that particular rights are subject to modification in a given situation by the claims arising out of other rights or of the body of rights as a whole. Since no single right whether natural or not is absolute, claims based on any one right may be subject to qualifications in accordance with claims based on other rights or the requirements of the total order or way of life, namely, the principle of the common good.[65] It is significant to note that Article 29(2) of the Declaration of Human Rights provides:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

---

[63] *See* Jacques Maritain, *Man and State*, p. 102.

[64] *See* generally *Justice and Equality* by Gregory Vilastos in *Social Justice*, p. 31 Ed. by Richard B. Brandt.

[65] See Morris Ginsberg: *Justice in Society*, p. 77.

1687. It shall be my endeavour to show in a subsequent part of this judgment how the general welfare of our democratic society requires limitation or even taking away of Fundamental Rights in certain circumstances.

1688. The framers of our Constitution realised that the Fundamental Rights, like natural rights, were not absolute and it was because of this that they provided for restrictions being imposed upon the exercise of these rights by law. But it was impossible for them, or for that matter, for any person, however, gifted they or he might be, to foresee the type of restrictions which would be necessary to meet the changing needs of a society. Even men with the most prophetic vision could not have foreseen all the developments of the body politic in the future and the type of restrictions necessary upon the Fundamental Rights to meet them. The question whether a particular Fundamental Right should be taken away or abridged for the common good of the society must be decided in the light of the experience of each generation and not by what was said or laid down at the time of the framing of the Constitution. It would be asking the impossible to expect one generation to plan a government that would pass through all the revolutionary changes in every aspect of life.

1689. Let us now see whether in the past the Parliament was justified in amending some of the Fundamental Rights and whether the fear expressed by the counsel for the petitioner, that great catastrophic consequences will follow if the Fundamental Rights are permitted to be abridged by constitutional Amendments is justified.

1690. The first amendment made certain changes in Article 15 which deals with prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Clause (3) of Article 15 allowed the State to make special provision for women and children. A new clause was added by the Amendment which reads as follows:

> "(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any specially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

This amendment was necessitated on account of the decision of this Court in the *State of Madras* v. *Champakam*[66] to the effect that reservation of seats for backward classes, Scheduled Castes and Tribes in public institutions was invalid, as it would offend the Fundamental Rights guaranteed under Article 29(2). When this Court said that the reservation of seats for these classes offended the Fundamental Right guaranteed under Article 29(2), what option was left but for the Parliament to enact the Amendment, for, social justice required discriminatory treatment in favour of the weaker sections of the people and in particular the Scheduled Castes and Tribes in order to promote their educational and economic interest and to give them a position of equality. It is possible to sympathise with those who bewail the decision in the case as a 'self-inflicted wound'. But when a Bench of five Judges held so, not all the tears in the world can recall a word of what was written, but only an amendment by Parliament, since the chance of the decision being overruled was remote and problematical.

1691. The second and sixth clauses of Article 19 were also amended by the First Amendment. Article 19(1)(*a*) provides that all citizens shall have the right to freedom of speech and expression. Before the amendment, Article 19(2) read:

---

[66] 1951 SCR 525: AIR 1951 SC 226 : 1951 SCJ 313.

> "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

After the amendment, the same clause reads:

> "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the ……security *of the State, friendly relations with foreign States,* public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

This amendment was necessitated by the decision of this Court in *Romesh Thapar* v. *State of Madras*,[67] wherein it was held that the disturbance of public order did not come within the expression "undermines the security of the State". No doubt, in *State of Bihar* v. *Shailabala Devi*,[68] this Court said that it did not intend to lay down in *Romesh Thapar's case* (supra) that in no case will an offence against public order affect the security of the State, but that point is not of much interest in view of the Amendment. When this Court held that the word 'public order' would not come within the expression "undermines the security of State", no option was left to Parliament but to make the Amendment. The words "friendly relations with foreign States" introduced a further abridgment of the freedom of speech but nobody would contend that maintenance of friendly relations with foreign States is unnecessary and that speech which would prejudicially affect these relations should not be curbed even as England and America have done.

1692. The 16th Amendment added after the words "in the interests of" the words "the sovereignty and integrity of India" in clauses (2), (3) and (4) of Article 19. This means that the Fundamental Rights to freedom of speech and freedom of assembly were abridged for the sake of maintaining the sovereignty and integrity of India. Freedom of speech is the matrix upon which all other freedoms are founded and nobody would deny that it is an essential feature of the Constitution. But that had to be damaged for the sake of a greater good, namely, the maintenance of the sovereignty and integrity of India. And who would dare maintain that the amendment was unnecessary? These amendments illustrate that exigencies not visualized by the makers of the Constitution would arise and that Fundamental Rights will have to be abridged for the common good or for securing higher values.

1693. It was because counsel for the petitioner realised the necessity for amendment of Fundamental Rights in certain circumstances in such a way as to abridge them that he advanced the further contention that although Parliament should have the power to amend the Fundamental Rights, there is implied limitation upon its power to amend them in such a way as to damage or destroy their core or essence, and that the Court must, in the case of each amendment, pass upon the question whether the amendment has destroyed or damaged the essence or the core of the right. Counsel said that if the task of adjudging what is "reasonable restriction in the interest of public" could be undertaken successfully by Court there is no reason why the Court could not undertake the task of finding the core or essence of a right and whether the amendment has damaged or destroyed it.

---

[67] 1950 SCR 594: AIR 1950 SC 124: 1950 SCJ 418: 51 Cri LJ 1514.

[68] 1952 SCR 654: AIR 1952 SC 329: 1952 SCJ 465: 1952 Cri LJ 1373.

1694. Mr. Seervai for the State of Kerala submitted that no objective standard was suggested for the Court to decide what is the core or essence of a right except the perception of the trained judicial mind and that whereas judicial review of the question whether a restriction imposed by a law is reasonable or not is based on the objective standard of reason, there is no divining rod for the Court to locate and find the Core of a right. He referred to the dissenting judgment of Holmes in *Lochner* v. *New York*[69] and to the dictum of Patanjali Sastri, J., in *State of Madras* v. *V. G. Row*[70] and said that the concept of 'reasonable man', that latch key to many legal doors, or, 'reasonable restriction in the interest of public' mentioned in clauses (2) to (6) of Article 19 or "reasonable restrictions" in Article 304(*b*) are objective in character, though there might be difference of opinion in a particular case in the application of the concepts; but the task of finding the core of a Fundamental Right is like the quest for the "philosopher's stone", and that the Amending Body will be left without chart or compass when it proceeds to make an amendment. Mr. Seervai further submitted that our Constitution-makers deliberately omitted the phrase 'due process' in Article 21 to avoid flirtation by Court with any gossamer concepts drawn from higher law philosophy to annul legislation and that even in America, invalidation of law on the ground of violation of substantive due process has become practically obsolete.

1695. When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources. In fact, you measure the reasonableness of a restriction imposed by law by indulging in an authentic bit of special legislation.[71] "The words 'reason' and 'reasonable' denote for the common law lawyer ideas which the 'Civilians' and the 'Canonists' put under the head of the 'law of nature'. Thus the law of nature may finally claim in principle, though not by name, the reasonable man of English and American law and all his works which are many".[72] Lord Coke said in *Dr. Bonham's case*[73] that the common law will adjudge an Act of Parliament as void if it is against common right and reason and substantive due process in its content means nothing but testing an act or legislation on the touchstone of reason. The reason why the expression "due process" has never been defined is that it embodies a concept of fairness which has to be decided with reference to the facts and circumstances of each case and also according to the mores for the time being in force in a society to which the concept has to be applied. As Justice Frankfurter said, "due process" is not a technical conception with a fixed content unrelated to time, place and circumstance.[74] The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the Legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause. in *Municipal Committee* v. *The State of Punjab*[75] this Court said that due process clause has no application in India and that a law cannot be struck down as constituting an unreasonable restriction upon Fundamental Rights merely because its terms were vague. The Court said that a law whose terms were vague would be struck down as violative of due process in America but, nevertheless the principle has no application here because there is no "due process clause" in our Constitution. With great respect, I should think that this is not correct, as the concept of "due process" enters into the meaning of reasonableness of restrictions in clauses (2) to (6) of Article 19. In *Collector of Customs* v. *Sampathu*,[76] Rajagopala Ayyangar, J. said that though the tests of 'reasonableness' laid down by clauses (2) to (6) of Article 19 might in great part coincide with that for judging for 'due process' it might not be assumed that these are identical, as the Constitution framers deliberately avoided in this context the use of the expression 'due process' with its comprehensiveness, flexibility and attendant vagueness in favour of a somewhat more definite word 'reasonable'. In the light of what I have said, I am unable to understand how the word 'reasonable' is more definite than the words 'due process'. As the concept of 'due process' draws its nourishment from natural or higher law so also the concepts of 'reason' and 'reasonableness' draw the juice for their life from the law of reason, which for the common law lawyer is nothing but natural law.[77] In *Abbas* v. *Union of India*[78] Hidayatullah, C. J., speaking for the Court said:

---

[69] 198 US 45.

[70] 1952 SCR 597: AIR 1952 SC 196: 1952 SCJ 253: 1952 Cri LJ 966.

[71] *See* Learned Hand, *Bill of Rights*, p. 26.

[72] See *History of the Law of Nature* by Pollock, pp. 57-59.

[73] 8 Rep. 107, 118(*a*).

[74] See *Joint Anti-Fascist Refugee Committee* v. *Mcgrath*, 341 US 123.

> "........ it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered."

Where a law imposes a restriction upon a Fundamental Right which is vague in character, it would be struck down as unreasonable under clauses (2) to (6) of Article 19 for the same reason as an American Court would strike it down as violative of due process, viz., a person cannot be deprived of his Fundamental Right by a law whose command is uncertain and does not sufficiently indicate to the individual affected by it how he could avoid coming within the mischief of the law. Our Constitution-makers, under the guise of testing the reasonableness of restrictions imposed by law on Fundamental Rights, brought in by the back door practically the same concept which they openly banished by the front.

1696. I am not dismayed by the suggestion that no yardstick is furnished to the Court except the trained judicial perception for finding the core or essence of a right, or the essential features of the Constitution. Consider for instance, the test for determining citizenship in the United States that the alien shall be a person of "good moral character" the test of a crime involving "moral turpitude", the test by which you determine the familiar concept of the "core of a contract", the "pith and substance" of a legislation or the "essential legislative function" in the doctrine of delegation. Few constitutional issues can be presented in black and white terms. What are essential features and non-essential features of the Constitution? Where does the core of a right end and the periphery begin? These are not matters of icy certainty; but, for that reason, I am not persuaded to hold that they do not exist or, that they are too elusive for judicial perception. Most of the things in life that are worth talking about are matters of degree and the great judges are those who are most capable of discerning which of the gradations make genuine difference.

---

[75] (1969) 3 SCR 447, 453: (1969) 1 SCC 475.

[76] (1962) 3 SCR 786, 816: AIR 1962 SC 316: (1962) 1 SCJ 68: (1962) 1 Cri LJ 364.

[77] *See* Pollock: *The Expansion of Common Law*, 108-109.

[78] (1971) 2 SCR 446, 470: (1970) 2 SCC 780, 799 (para 45).

1697. Nor do I think that all the provisions in the Constitution are equally essential. Gladstone said, the most wonderful work ever struck off at a given time by the brain and purpose of man is the Constitution of the United States of America. Lord Bryce said much the same thing when he observed that it is one of the greatest contributions ever made to politics as a practical art. Yet it consists only of VII articles with the Amendments. A Constitution need not partake the prolixity of a code. And our Constitution could very well have dropped many of its provisions. Merely because all the provisions of the Constitution have equal importance in one respect, namely, they are all embodied in one document, and can be amended only by the procedure prescribed in Article 368, it does not follow that all of them are essential features of the document in all other respects.

1698. But the question will still remain, even when the core or the essence of a Fundamental Right is found, whether the Amending Body has the power to amend it in such a way as to destroy or damage the core. I have already said that considerations of justice, of the common good, or "the general welfare in a democratic society" might require abridging or taking away of the Fundamental Rights.

1699. I have tried, like Jacob of the Old Testament to wrestle all the night with the angel, namely, the theory of implied limitation upon the power of amendment. I have yet to learn from what source this limitation arises. Is it because the people who were supposed to have framed the Constitution intended it and embodied the intention in an unalterable framework? If this is so, it would raise the fundamental issue whether that intention should govern the succeeding generations for all time. If you subscribe to the theory of Jefferson, to which I have already referred and which was fully adopted by Dr. Ambedkar, the principal architect of our Constitution—and that is the only sane theory—I think there is no foundation for the theory of implied limitations. Were it otherwise, in actual reality it would come to this: The representatives of some people the framers of our Constitution—could bind the whole people for all time and prevent them from changing the constitutional structure through their representatives. And, what is this sacredness about the basic structure of the Constitution? Take the republican form of government, the supposed cornerstone of the whole structure. Has mankind, after its wandering through history, made a final and unalterable verdict that it is the best form of government? Does not history show that mankind has changed its opinion from generation to generation as to the best form of government? Have not great philosophers and thinkers throughout the ages expressed different views on the subject? Did not Plato prefer the rule by the Guardians? And was the sapient Aristotle misled when he showed this proclivity for a mixed form of government? If there was no concensus yesterday, why expect one tomorrow?

1700. The object of the people in establishing the Constitution was to promote justice, social and economic, liberty and equality. The *modus operandi* to achieve these objectives is set out in Parts III and IV of the Constitution. Both Part III and IV enumerate certain moral rights. Each of these Parts represents in the main the statements in one sense of certain aspirations whose fulfilment was regarded as essential to the kind of society which the Constitution-makers wanted to build. Many of the articles, whether in Part III or Part IV, represents moral rights which they have recognized as inherent in every human being in this country. The task of protecting and realising these rights is imposed upon all the organs of the State, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a Court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV? I think not. Free and compulsory education under Article 45 is certainly as important as freedom of religion under Article 25. Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation in all circumstances whereas practical exigencies may sometimes entail some compromise in the implementation of the moral claims in Part IV. When you translate these rights into socio-political reality, some degree of compromise must always be present. Part IV of the Constitution translates moral claims into duties imposed on government but provided that these duties should not be enforceable by any Court.[79] The question has arisen what will happen when there is a conflict between the claims in Part IV and the rights in Part III and whether the State would be justified at any given time in allowing a compromise or sacrifice the one at the expense of the other in the realisation of the goal of the good life of the people. What is the relationship between the rights guaranteed by Part III and the moral rights in Part IV? In the *State of Madras* v. *Champakam* (supra) already referred to this Court held that the Fundamental Rights being sacrosanct, the Directive Principles of State Policy cannot override them but must run as subsidiary to them. This view was affirmed by this Court in *Quareshi* v. *State of Bihar.*[80] S. R. Das, C J., who delivered the judgment of the Court said that the argument that the laws were passed in the discharge of the fundamental obligation imposed on the State by the Directive Principles and therefore, they could override the restrictions imposed on the legislative power of the State by Article 13(2) or that a harmonious interpretation has to be placed upon the provisions of the Act was not acceptable. It was held that the State should implement the Directive Principles but that it should do so in such a way that its laws do not take away or abridge the Fundamental Rights: as otherwise, the protecting provisions of Part III will be a mere rope of sand. In *Golaknath's case* (supra) Subba Rao, C. J. said that Fundamental Rights and Directive Principles of State Policy form an integrated whole and were elastic enough to respond to the changing needs of the society. There are observations in later cases of this Court that it is possible to harmonize Part III and Part IV.

1701. The significant thing to note about Part IV is that, although its provisions are expressly made unenforceable, that does not affect its fundamental character. From a juridical point of view, it makes sense to say that Directive Principles do form part of the Constitution Law of India and they are in no way subordinate to Fundamental Rights. Prof A. L. Goodhart said:

> "........ if a principle is recognized as binding on the Legislature, then it can be correctly described as a legal rule even if there is

---

[79] *See* generally A. R. Blackshield *Fundamental Rights & Economic Viability of the Indian Nation*, Journal of Indian Law Institute, Vol. 10 (1968) 1, pp. 26-28.

[80] 1959 SCR 629: AIR 1958 SC 731: 1958 SCJ 975.

> no court that can enforce it. Thus, most of Dicey's book on the British Constitution is concerned with certain general principles which Parliament recognizes as binding on it."[81]

Enforcement by a Court is not the real test of a law.[82] The conventions of English Constitution are not enforceable in a Court of law but they are, nevertheless, binding and form part of the constitutional law of the land. The similarity between the constitutional conventions in England and Directive Principles of State Policy in India cannot be disputed.

1702. The only purpose of Article 37 is to prevent a citizen from coming forward and asking for specific performance of the duties cast upon the State by the Directive Principles. But if a state voluntarily were to implement the Directive Principles, a Court would be failing in its duty, if it did not give effect to the provisions of the law at the instance of a person who has obtained a right under the legislation. As the implementation of the Directive Principles involves financial commitments on the part of the Government and depends upon financial resources, it was thought meet (*sic* best) that no private citizen should be allowed to enforce their implementation. But nevertheless, when the State, in pursuance of its fundamental obligation makes a law implementing them, it becomes the law of the land and the judiciary will be found to enforce the law. What is to happen if a State were to make a law repugnant to the Directive Principles? Would the Court be justified in striking down the law as contrary to the Law of the Constitution or, on what basis will a conflict between Part III and Part IV be solved? The questions require serious consideration.

1703. The definition of the word 'State' both for the purpose of Part III and Part IV is the same. Whereas Article 45 of the Irish Constitution addresses the dire tive only for the guidance of the *Oireachtas*, i. e, the Legislature, all the directives from Articles 38 to 51 of our Constitution are addressed to the 'State' as defined in Article 12. That judicial process is also "State Action" seems to be clear. Article 20(2) which provides that no person shall be prosecuted and punished for the same offence more than once is generally violated by the judiciary and a writ under Article 32 should lie to quash the order. In his dissenting judgment in *Naresh* v. *State of Maharashtra*[83] Hidayatullah, J., took the view—I think rightly—that the judiciary is also "State" within the definition of the word "State" in Article 12 of the Constitution.[84] Frankfurter, J., asked the question that if the highest court of a State should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situation, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of law?[85] In *Carter* v. *Texas*,[86] the Court observed that whenever by any action of a State, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or colour, from serving as............jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied.

---

[81] See the passage quoted in *Equal Protection Guarantee and the Right to Property under the Indian Constitution*, by Jagat Narain, *International and Comparative Law* Quarterly, Vol. 15, 1966, pp. 206-7.

[82] See *A Note on the Theory of Law Law and the Constitution* 5th ed. p. 330 by Ivor Jennings.

[83] (1966) 3 SCR 744: AIR 1967 SC 1.

[84] See also *Shelley* v. *Kraemer*, 334 US 1; *Budhan* v. *State of Bihar*, (1955) 1 SCR 1045: AIR 1955 SC 191: 1955 SCJ 163: 1955 Cri LJ 374;

[85] See *Buckus* v. *Fort Street Union Depot Co.*, 1969 US 557, 571, also *Snowden* v. *Hughes*, 321 US 1.

[86] 177 US 442, 447.

1704. If convicting and punishing a person twice for an offence by a judgment is equivalent to the "State passing a law in contravention of the rights conferred by Part III" for the purpose of enabling the person to file a petition under Article 32 to quash the judgment, I can see no incongruity in holding, when Article 37 says in its latter part "it shall be the duty of the State to apply these principles in making laws", that judicial process is 'State action' and that the judiciary is bound to apply the Directive Principles in making its judgment.

1705. The judicial function is, like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norms both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the Constitution only in the former respect. But that is a difference in degree only. From a dynamic point of view, the individual norm created by the judicial decision is a stage in a process beginning with the establishment of the first Constitution, continued by legislation and customs, and leading to the judicial decisions. The Court not merely formulates already existing law although it is generally asserted to be so. It does not only 'seek' and 'find' the law existing previous to its decision, it does not merely pronounce the law which exists ready and finished prior to its pronouncement. Both in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character. The law-creating function of the courts is especially manifest when the judicial decision has the character of a precedent, and that means when the judicial decision creates a general norm. Where the courts are entitled not only to apply pre-existing substantive law in their decisions, but also to create new law for concrete cases, there is a comprehensible inclination to give these judicial decisions the character of precedents. Within such a legal system, courts are legislative organs in exactly the same sense as the organ which is called the legislator in the narrower and ordinary sense of the term. Courts are creators of general legal norms.[87] Lord Reid said :[88]

> "Their was a time when it was thought almost indecent to suggest that judges make-law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame... But we do not believe in fairy tales any more."

I do not think any person with a sense of realism believes today as Blackstone did that the law declared by the courts has a platonic or ideal existence before it is expounded by Judges. John Chipman Gray said that in the last analysis the courts also make our statute law and quoted the passage from the famous sermon of Bishop Hoadly that whoever has absolute power to interpret the law, it is he who is law-giver, not the one who originally wrote it.[89]

1706. It is somewhat strange that judicial process which involves law-making should be called 'finding the law'. "Some simple-hearted people believe that the names we give to things do not matter. But though the rose by any other name might smell as sweet, the history of civilization bears ample testimony to the momentous influence of names. At any rate, whether the process of judicial legislation should be called finding or making the law is undoubtedly of great practical moment".[90] Nobody doubts today that within the confines of vast spaces, a judge moves with freedom which stamps his action as creative. "The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom".[91]

---

[87] See Kelsen, "*General Theory of Law and State*" pp. 134-5 & 149-150.

[88] *See* the recent address of Lord Reid "*The Judge as Law Maker*" (1972) 12 JS PTL (NS) 22, 29.

[89] See "*Nature and Sources of the Law*" pp. 102, 125, 172.

1707. It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to Directive Principles. The makers of the Constitution had the vision of a future where liberty, equality and justice would be meaningful ideals for every citizen. There is a certain air of unreality when you assume that Fundamental Rights have any meaningful existence for the starving millions. What boots it to them to be told that they are the proud possessors of the Fundamental Rights including the right to acquire, hold and dispose of property if the society offers them no chance or opportunity to come by these rights? Or, what boots it to the begger in the street to be told that the Constitution in its majestic equality, holds its scales even and forbids by law both his tribe and the rich to beg in the street, to steal bread or sleep under the bridge? This is not to say that the struggle for a just economic order should be allowed to take priority over the struggle for the more intangible hopes of man's personal self-fulfilment. But in particular contexts, fundamental freedoms and rights must yield to material and practical needs. Economic goals have an un-contestable claim for priority over ideological ones on the ground that excellence comes only after existence.[92] It is only if men exist that there can be fundamental rights. "Tell an unprovisioned man lost in the desert that he is free to eat, drink, bathe, read........ .... No one is hindering him! For the attainment of most of these ends he might better be in prison. Unrestraint without equipment is not liberty for any end which demands equipment ....Unemployment is a literal unrestraint, a marked freedom from the coercions of daily toil but as destructive of means it is the opposite of freedom for... .....To contemporary consciousness it has become an axiom that there can be *no freedom without* provision.[93]

1708. The tweentieth century juristic thinking has formulated two jural postulates. They are (1) Every one is entitled to assume that the burdens incidental to life in society will be borne by society; (2) Every one is entitled to assume that at least a standard of human life will be assured to him; not merely equal opportunities of providing or attaining it but immediate material satisfaction.[94]

1709. The concept of liberty or equality can have meaning only when men are alive today and hope to be alive tomorrow. "One hates to think how few Indians, for example, have any idea that their Constitution provides basic rights, let alone what those rights are or how they could be defended when violated by Government".[95] So the main task of freedom in India for the large part of the people is at the economic level.

---

[90] *See* M.R. Cohen, "*Law and the Social Order*" (1933), pp. 121-124.

[91] *See* Benjamin N. Cardozo, "*The Nature of the Judicial Process*", p. 115.

[92] *See generally* A.R. Blackshield "*Fundamental Rights and Economic Viability of the Indian Nation*". Journal of the Indian Law Institute, Vol. 10 (1968) 1.

[93] *See* Hocking: "*Freedom of the Press,*" pp. 55-56.

[94] *See* Roscoe Pound: "*Jurisprudence*" Vol. 1, Section 46 (Twentieth Century).

[95] *See* Carl, J. Friedrich: *Man and His Government*, p. 272.

1710. Roscoe Pound who expounded his theory of interest as a criterion of justice insists without qualification that the "interest" or "claims" or "demands" with which he is concerned are *de facto* psychological phenomena which pre-exist and are not merely the creation of the legal order.[96]

1711. Pound's proposals seem, in the last analysis, to be an attempt to implement the familiar thought that there should be a correspondence between the demands made by men in a given society at a given time and its law at that time.

1712. The scheme of interests should include, all the *de facto* claims actually made. This, of course, is not to say that every *de facto* claim or interest which finds a place in the scheme of interests will be given effect in all circumstances. Claims within a legal order which are not necessarily mutually incompatible may nevertheless come into conflict in particular situations. Indeed most of the problems in which the judgment of justice is called for arise from a conflict of two or more of such *de facto* claims, none of which can be given effect to completely without prejudice to the others. The scheme of interests, like the jural postulates, is a device for presenting to the mind of the legislator a rough picture of the actual claims made by men in a given society at a given time, to which justice requires them to give effect so far as possible.[97] And what are the *de facto* claims crying aloud for recognition as interests for the millions of people of this country? That can probably admit of only one answer, by those who have eyes to see and ears to hear. By and large, the rough picture of the actual claims made by the millions of people in this country and which demand recognition as interests protected by law is sketched in Part IV of the Constitution. A judgement of justice is called for when these claims which call for recognition in law as interest conflict with other rights and interests. That judgment has to be made by the dominant opinion in the community. For a judge to serve as a communal mentor, as Learned Hand said, appears to be a very dubious addition to his duties and one apt to interfere with their proper discharge. The Court is not the organ intended or expected to light the way to a saner world, for, in a democracy, that choice is the province of the political branch i.e. of the representatives of the people, striving however blindly or inarticulately, towards their own conception of the Good Life.

1713. It is inevitable that there should be much gnashing of teeth when a society opts for change and breaks with its older *laissez faire* tradition, which held before the eyes of both the rich and the poor a golden prize for which each may strive though all cannot attain it and which in particular provided the rich with an enchanting vision of infinite expansion, and switches on to a new social order where claims of individual self assertion and expansion are subordinated to the common good.

1714. To sum up this part of the discussion, I think there are rights which inhere in human beings because they are human beings—whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives. The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values. And, if Parliament in its capacity as the Amending Body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution the Court cannot adjudge the constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant. Judicial review of a constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the Fundamental Rights embodied in Part III is impermissible. Taking for granted, that by and large that Fundamental Rights are the extensions, permutations and combinations of natural rights in the sense explained in this judgment, it does not follow that there is any inherent limitation by virtue of their origin or character in their being taken away or abridged for the common good. The source from which these rights derive their moral sanction and transcedental character, namely, the natural law, itself recognizes that natural rights are only *prima facie* rights liable to be taken away or limited in special circumstances for securing higher values in a society or for its common good. But the responsibility of the Parliament in taking away or abridging a Fundamental Right is an awesome one and whenever a question of constitutional amendment which will have the above effect comes up for consideration, Parliament must be aware that they are the guardians of the rights and liberties of the people in a greater degree than the courts, as the courts cannot go into the validity of the amendment on any substantive ground.

---

[96] *See* Pound: 3 *Jurisprudence*, 5-24, esp. 16-21.

[97] *See* Julius Stone: *Human Law and Human Justice*, pp. 269-270.

1715. In the light of what I have said, I do not think that there were any express or implied limitations upon the power of Parliament to amend the Fundamental Rights in such a way as to destroy or damage even the core or essence of the rights and the 24th Amendment, by its language, makes it clear beyond doubt. The opening words of the amended article should make it clear that no invisible radiation from any other provision of the Constitution would operate as implied limitation upon the power of amendment. Further, the amended Article 368 puts it beyond doubt that the power to amend the provisions of the Constitution is in the article itself, that the power includes the power to add, vary or repeal any provision of the Constitution, that the power is a constituent power, that the assent of the President to a bill for amendment is compulsory and that nothing in Article 13(2) will apply to an amendment under the Article.

1716. Article 368, as it stood before the Amendment, conferred plenary power to amend all the provisions of the Constitution and the 24th Amendment, except in one respect, namely, the compulsory character of the assent of the President to a Bill for amendment, is declaratory in character. To put it in a different language, as the majority decision in the *Golaknath case*[98] negatived the constituent power of the Parliament to amend the Fundamental Rights in such a way as to take away or abridge them which according to the Amending Body, was wrong, the Amending Body passed the Amendment to make it clear that the power to amend is located in the article, that it is a constituent power and not a legislative power as held by the majority decision in the *Golaknath case* (supra) that the power is plenary in character and that Article 13(2) is not a bar to the amendment of the Fundamental Rights in such a way as to take away or abridge them under Article 368. That the object of the amendment was declaratory in character is clear from the Statement of Objects and Reasons for the Amendment. That says that the Amendment was made to provide expressly that the Parliament has competence, in the exercise of its amending power, to abridge or take away the Fundamental Rights since the majority in the *Golaknath case* (supra) held that the Parliament had no such power. As I have already said, the Amendment has added nothing to the content of the article except the requirement as to the compulsory character of the assent of the President to the bill for amendment. That an Amending Body, in the exercise of its power to amend, if the power to amend is plenary, can make an amendment in order to make clear what was implicit in the article and to correct a judicial error in the interpretation of the article appears to me to be clear.

1717. Mr. Palkhivala contended that as the power to amend under Article 368 as it stood before the 24th Amendment was itself limited, the power to amend that power cannot be utilised to enlarge the amending power.

1718. There is nothing illegal or illogical in a donor granting a limited power coupled with a potential power or capacity in the donee to enlarge the limit of that power according to the discretion of the donee. It is a mistake to suppose even on the assumption that the actual power to amend under Article 368 as it stood before the 24th Amendment was limited, the Amending Body cannot enlarge the limit of the power. As I said, even if it be assumed that the actual power for amendment under the article was limited, the article gave the Amending Body a potential power, to enlarge or contract the limit of the actual power. The potential power when exercised by the Amending Body makes the actual power either enlarged or contracted. The wording of proviso to Article 368, *viz.*, "If the amendment seeks to make any change............(*e*) in the provision of this article" makes it clear that the object of the amendment of the article is to make change in Article 368. On what basis is the assumption made that by making change in the article, the area of the power, if actually limited, cannot be enlarged? I must confess my inability to perceive any limit as to the character of the change that might be made in the amending power. It was assumed by Hidayatullah, J., in his judgment in *Golaknath case* (supra) that the article can be so amended and a Constituent Assembly convoked to amend the Fundamental Rights. Is such an amendment of Article 368 possible if the argument of the petitioner is right that the power to amend the amending power cannot be exercised so as to change the locus or the width of the amending power? The only thing required would be that the amending power should be amended in the manner and form prescribed by the Article itself. And there is no case that that has not been done.

---

[98] (1967) 2 SCR 762 : AIR 1967 SC 1643 : (1967) 2 SCJ 486.

1719. Counsel also submitted that the operation of Article 13(2) was not liable to be taken away by the amendment. He said that although there was no express provision in Article 13(2) or in Article 368 which prevented the operation of Article 13(2) being taken away there was implied limitation for the reason that, if the Fundamental Rights could not have been amended in such a way as to take away or abridge them because of the inhibition contained in Article 13(2), that inhibition could not have been removed indirectly by amending Article 368 and Article 13(2). In other words, the argument was, as the word 'law' in Article 13(2) included an amendment of the Constitution, that was an express bar to the amendment of the Fundamental Rights in such a way as to take away or abridge them and, therefore, the Amending Body cannot do in two stages what it was prohibited from doing in one stage. Even on the assumption that the word 'law' in Article 13(2) included an amendment of the Constitution, I think there was nothing which prevented the Amending Body from amending Article 368 and Article 13(2) in such a way as to exclude the operation of Article 13(2) as there was no express or implied prohibition for doing so.

1720. The next question for consideration is whether the 25th Amendment is valid. By that Amendment, Article 31(2) was amended and the amended article says that no property shall be acquired save by the authority of law which provides for acquisition or requisition of the property for an '*amount*' which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and that no such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash. An exception has been made in the case of acquisition of property belonging to an educational institution established and administered by a minority referred to in clause (1) of Article 30 by providing that the State shall ensure that the amount fixed by or determined under the law for acquisition of such property must be such as would not restrict or abrogate the right guaranteed under that clause. Clause (2-B) to Article 31 provides for dispensing with the application of Article 19(1)(*f*) to any law as is referred to in sub-clause (2) of Article 31. A new article was also inserted viz., Article 31-C which provides that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

1721. Mr. Palkhivala contended that the Fundamental Right to acquire, hold and dispose of property is an essential feature of the Constitution, that there can be no dignified citizens in a State unless they have the right to acquire and hold property, that the right to acquire and hold property is essential for the enjoyment of all other Fundamental Rights as it is the basis on which all other rights are founded, that the Fundamental Rights guaranteed to the minorities would become a rope of sand if the right to hold and dispose of property can be taken away and as power to acquire property for an 'amount' inadequate or illusory is given to the

Parliament or State Legislature, that would damage the essence or core of the Fundamental Right to property. Counsel said that if the core or the essence of the right to hold property could be taken away by a law, the right to freedom of press under Article 19(1)(*a*) would become meaningless as a publisher could be deprived of his printing press by paying him a nominal amount and that the fundamental right of the workers to form associations and of the religious denominations to establish and maintain institutions for religious and charitable purpose would become empty words.

1722. The framers of the Constitution regarded the right to acquire and hold property as a Fundamental Right for the reason that a dignified human life is impossible without it. Whether it is the weakest of all Fundamental Rights would depend upon the question whether there is a heirarchy of values among the Fundamental Rights. The concept of preferred freedoms is an indication that some judges are inclined to put the right to hold property low in the scale of values.

1723. The exponents of natural law like Aristotle, St. Thomas, Aquinas, Hobbes and even positivists are agreed that right to life and property is the presupposition of a good legal order. Property, according to Aristotle, is an instrument of the best and highest life. Property is the necessary consequence and condition of liberty. Liberty and property demand and support each other.

1724. The doctrine of natural rights has exercised a profound influence upon the conception of private property. In its most modern form it insists that property is indispensable to man's individual development and attainment of liberty. Without dominion over things, man is a slave.[99]

1725. The most that we can claim, as a general principle applicable to all stages of social development, is that without some property or capacity for acquiring property, there can be no individual liberty, and that without some liberty there can be no proper development of character.[1]

1726. Persons without property enjoy no sense of background such as would endow their individual lives with a certain dignity. They exist on the surface; they cannot strike roots, and establish permanency.[2]

1727. In short, the concept of property is not an arbitrary ideal but is founded on man's natural impulse to extend his own personality. In the long run, a man cannot exist, cannot make good his right to marriage or found a family unless he is entitled to ownership through acquisition of property.

1728. However, it is a very common mistake to speak of property as if it were an institution having a fixed content constantly remaining the same; whereas in reality, it has assumed the most diverse forms and is still susceptible to great unforeseen modifications.

1729. The root of the difficulty is that in most of the discussions the notion of private property is used too vaguely. It is necessary to distinguish at least three forms of private property: (1) property in durable and non-durable consumer's goods; (*ii*) property in the means of production worked by their owners; (*iii*) property in the means of production not worked or directly managed by their owners, especially the accumulations of masses of property of this kind in the hands of a relatively narrow class. While the first two forms of property can be justified as necessary conditions of a free and purposeful life, the third cannot. For this type of property gives power not only over things, but through things over persons. It is open to the charge made that any form of property which gives man power over man is not an instrument of freedom but of servitude.[3]

---

[99] *See* Jonn Moffatt Mecklin; "*An Introduction to Social Ethics*", pp. 302-321.

[1] *See* Rashdall; "*Property: Its Duties and Rights*" pp. 52-64.

[2] Holland, "*Property: Its Duties and Rights*", pp. 183-192.

1730. The foundation of our society today is found not in *functions*, but in *rights*; that rights are not deducible from the discharge of functions, so that the acquisition of wealth and the enjoyment of property are contingent upon the performance of services but that the individual enters the world equipped with rights to the free disposal of this property and the pursuit of his economic self-interest, and that these rights are anterior to, and independent of any service which he may render. In other words, "the enjoyment of property and the direction of industry are considered to require no social justification".[4]

1731. The framers of our Constitution made the right to acquire, hold and dispose of property a Fundamental Right thinking that every citizen in this country would have an opportunity to come by a modicum of that right. Therefore, as the learned Attorney General rightly contended, any defence of the right to own and hold property must essentially be the defence of a well distributed property and not an abstract right that can, in practice, be exercised only by the few.

1732. Article 39(*b*) provides that the State shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(*c*) states that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

1733. Sir Ivor Jennings has said that the propositions embodied in these sub-articles are derived from Article 45 of the Irish Constitution and that in turn is based upon Papal Bulls.[5]

1734. His Holiness Pope Paul VI, following the previous encyclicals on the subject has said :[6]

> "To quote St. Ambrose : '. . . . . the world is given to all, and not only to the rich'. That is, private property does not constitute for anyone an absolute and unconditioned right. No one is justified in keeping for his exclusive use what he does not need, when others' lack necessities. In a word, according to the traditional doctrine as found in the Fathers of the Church and the great theologians, the right to property must never be exercised to the detriment of the common good.
>
> "God has intended the earth and all that it contains for the use of all men and all peoples. Hence, justice, accompanied by charity, must so regulate the distribution of created goods that they are actually available to all in an equitable measure."

---

[3] *See* Professor Morris Ginsberg: "*Justice in Society*", p. 101.

[4] *See* Richard Henry Tawney, "*The Acquisitive Society*", Chapters II and IV.

[5] *See* Sir Ivor Jennings, "*Some Charateristics of the Indian Constitution*", pp. 31-32.

[6] *See* Encyclical Letter of Pope Paul VI (1967), "*On the Development of Peoples*", pp. 18, 58 footnote at p. 58.

> "Moreover all have the right to possess a share of earthly goods sufficient for themselves and their families."
>
> "In extreme necessity all goods are common, that is, are to be shared."

1735. The basic institution of property is not to be confused with particular forms it may assume in different ages or regions. These will be justified according as they continue to show that they are achieving the general aim of ministering to the good of human life. Natural right may also be violated under a regime in which a great number, although theoretically free, are in practice excluded from the possibility of acquiring property.[7]

1736. When property is acquired for implementing the directive principles under Article 39(*b*) or 39(*c*), is there an ethical obligation upon the State to pay the full market value? In all civilized legal systems, there is a good deal of just expropriation or confiscation without any direct compensation. Indeed no one, in fact, had the courage to argue that the State has no right to deprive an individual of property to which he is so attached that he refuses any money for it. Article 31(2-A) proceeds on the assumption that there is no obligation upon the State to pay compensation to a person who is deprived of his property. What does it matter to the person who is deprived of his property whether, after the deprivation, the State or a Corporation owned or controlled by the State acquires title to it? Every acquisition by State pre-supposes a deprivation of the owner of the property. If, when depriving a person of his property, the State is not bound to pay compensation, what is the principle of justice which demands that he should be compensated with full market value merely because the title to the property is transferred to State or the Corporation as aforesaid after the deprivation. No absolute principle of justice requires it. The whole business of the State depends upon its rightful power to take away the property of Dives in the form of taxation and use it to support Lazarus. When slavery was abolished in America, by law, the owners had their property taken away. The State did not consider itself ethically bound to pay them the full market value of their slaves. It is certainly a grievous shock to a community to have a large number of slave owners, whose wealth made them leaders of culture, suddenly deprived of their income. Whether it was desirable for the slaves themselves to be suddenly taken away from their masters and cut adrift on the sea of freedom without compensation is another matter. "When prohibition was introduced in America, there was virtual confiscation of many millions of dollars' worth of property. Were the distillers and brewers entitled to compensation for their losses? The shock to the distillers and brewers was not as serious as to others e. g., saloon keepers and bartenders who did not lose any legal property since they were only employees, but who found it difficult late in life to enter new employments. These and other examples of justifiable confiscation without compensation are inconsistent with the absolute theory of private property".[8]

1737. An adequate theory of social justice should enable one to draw the line between justifiable and unjustifiable cases of confiscation.

---

[7] *See* William, J. McDonald, "*The Social Value of Property according to St. Thomas Aquinas*", p. 183.

[8] *See* generally M. R. Cohen: "*Property and Sovereignty*", Law and Social Order, p. 45 onwards.

1738. The intention of the framers of the Constitution, when they drafted Article 24 [the original Article 31(2)], can be seen from the speech of Pandit Jawaharlal Nehru in the Constituent Assembly on September 10, 1949:[9]

> "…… ……Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution."

1739. Shri K. M. Munshi, who spoke in the Constituent Assembly on the draft Article 24 on September 12, 1949, observed:[10]

> "We find on the English Statute Book several Acts, the Land Acquisition Act, the Land Clauses Act, the Housing Act, in all of which a varying basis of compensation has been adopted to suit not only to the nature of the property but also the purpose for which it is to be acquired. Parliament therefore is the judge and master of deciding what principles to apply in each case."

1740. In the *State of West Bengal* v. *Bela Banerjee*,[11] the expectation entertained by the Constituent Assembly that the Court will not interfere with the fixation of compensation by Parliament was belied. The Court said in that case that the owner of the property expropriated must be paid the just equivalent of what he has been deprived of and that within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable.

1741. In order to bring Article 31(2) in conformity with the clear intention of the framers of the Constitution, the Fourth Amendment to the Constitution was passed and it came into effect on April 27, 1955. At the end of Article 31(2) the following words were introduced by the Amendment: "… ……..and no such law shall be called in question in any Court on the ground that the compensation provided by the law is not adequate". The effect of the amendment was considered by this Court in *P. Vajravelu Mudaliar* v. *Deputy Collector*.[12] Subba Rao, J., (as he then was) said that the fact that Parliament used the same expressions namely, 'compensation' and 'principles' as were found in Article 31 before the amendment is a clear indication that it accepted the meaning given by this Court to those expressions in *Mrs. Bela Banerjee's case* (supra) and that it follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of.

1742. In *Union of India* v. *Metal Corporation*,[13] it was laid down that to provide written down value of a machinery (as it was understood under the Income Tax Act) was not in compliance with Article 31(2) because it did not represent the just equivalent of the machinery, meaning thereby, the price at or about the time of its acquisition. Subba Rao, J., said that the law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result.

---

[9] *Constituent Assembly Debates*, Vol. IX, p. 1193.

[10] *Constituent Assembly Debates*, Vol. IX, p. 1299.

[11] 1954 SCR 558, 563-4: AIR 1954 SC 170: 1954 SCJ 95.

[12] (1965) 1 SCR 614, 626: AIR 1965 SC 1017: (1964) 2 SCJ 703.

[13] (1967) 1 SCR 255: AIR 1967 SC 637: (1967) 1 SCJ 182: 37 Com Cas 1.

1743. Two years later, in *Gujarat* v. *Shantilal*,[14] this Court overruled the decision in the *Metal Corporation's case* (supra) and Shah, J., observed that if the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent.

1744. In the *Bank Nationalisation case*,[15] the majority decision virtually overruled the decision in *Gujarat* v. *Shantilal* (supra). The majority was of the view that even after the Fourth Amendment 'compensation' meant "the equivalent in terms of money of the property compulsorily acquired" according to 'relevant principles' which principles must be appropriate to the determination or compensation for the particular class of property sought to be acquired.

1745. It was in these circumstances that the word 'amount' was substituted for 'compensation' in the sub-article by the 25th Amendment.

1746. It was submitted on behalf of the petitioner that the word 'amount' implies a norm for fixing it and that, at any rate, when principles for fixing the amount are referred to, the principles must have some relevancy to the amount to be fixed.

1747. The whole purpose of the amendment was to exclude judicial review of the question whether the 'amount' fixed or the principle laid down by law is adequate or relevant.

1748. Mukherjea, C. J., said in *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab*,[16] that the Cabinet, enjoying as it does, a majority in the Legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

1749. Much the same sentiment was expressed by Hegde, J.[17]:

> "In a Cabinet form of Government, the excutive is expected to reflect the views of the Legislature. In fact in most matters it gives the lead to the Legislature. However much one might deplore the 'New Despotism' of the executive, the very complexity of the modern society and the demand it makes on its government have set in motion forces which have made it absolutely necessary for the Legislatures to entrust more and more powers to the executive. Text book doctrines evolved in the 19th century have become out of date... "

1750. When the Cabinet formulates a proposal for aquisition of property, it will have the relevant materials to fix the amount to be paid to the owner or the principles for its fixation. Several factors will have to be taken into account for fixing the amout or laying down the principles; the nature of the property sought to be acquired, the purpose for which the acquisition is being made, the real investment of the owner excluding the fortuitous circumstances like unearned increment and also marginal utility of the property acquired to the owner. Principles of social justice alone will furnish the yardstick for fixing the amout or for laying down the principles. The proposal becomes embodied in law, if the Parliament agrees to the Bill embodying the proposal. The whole point is that the fixation of the amount or the laying down of the principle for fixing it is left to the absolute discretion of the Parliament or the State Legislatures on the basis of consideration of social justice. That the fixation is in the absolute discretion of Parliament or the State Legislature is further made clear when it is laid down that "no such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate". If the Parliament or State legislature can fix any amount, on consideration of principles of social justice, it can also formulate the principle for fixing the amount on the very same consideration. And the principle of social justice will not furnish judicially manageable standards either for testing the adequacy of the amount or the relevancy of the principle.

---

[14] (1969) 3 SCR 341: (1969) 1 SCC 509.

[15] *R.C. Cooper* v. *Union of India*, (1970) 3 SCR 530: (1970) 1 SCC 248.

[16] (1955) 2 SCR 225, 237: AIR 1955 SC 549· 1955 SCJ 504.

[17] See *Sita Ram Bishambhar Dayal* v. *State of U. P.*, (1972) 29 Sales Tax Cases: 206: (1972) 2 SCR 141: AIR 1972 SC 1168: (1972) 2 SCJ 556.

1751. The article as amended provides no norm for the Court to test the adequacy of the amount or the relevancy of the principle. Whereas the word 'compensation', even after the Fourth Amendment, was thought to give such a norm, namely, the just equivalent in money of the property acquired or full indemnification of the owner, the word 'amount' conveys no idea of any norm. It supplies no yardstick. It furnishes no measuring rod. The neutral word 'amount' was deliberately chosen for the purpose. I am unable to understand the purpose in *substituting* the word 'amount' for the word 'compensation' in the sub-article unless it be to deprive the Court of any yardstick or norm for determining the adequacy of the amount and the relevancy of the principles fixed by law. I should have thought that this coupled with the express provision precluding the Court from going into the adequacy of the amount fixed or determined should put it beyond any doubt that fixation of the amount or determination of the principle for fixing it is a matter for the Parliament alone and that the Court has no say in the matter.

1752. This Court said in *Shantilal's case*:[18]

> " ....it does not however mean that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the courts, for, to do so, would be to grant a charter of arbitrariness."

1753. These observations were made with reference to the sub-article as it stood before the 25th Amendment, namely, before the substitution of the word 'amount' for the word 'compensation' in it. Even if the decision of this Court in *Shantilal's case* (supra) is assumed to be correct, what is its relevancy after the substitution of the word 'amount' in Article 31(2) as regards the jurisdiction of the Court to test the adequacy of the amount on the ground of arbitrariness.

1754. I do not propose to decide nor is it necessary for the purpose of adjudging the validity of the 25th Amendment whether a law fixing an amount which is illusory or which is a fraud on the Constitution, can be struck down by Court. It is said that the instances in which the Court can interfere to test the adequacy of compensation or the relevancy of the principles for determination of compensation had been laid down in the *Bank Nationalisation case* (supra) and when the 25th Amendment did not make any change in the clause, namely, "no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate" but retained it in its original form, the only inference is that the Parliament approved the interpretation placed upon the clause by this Court, and therefore, the Court has power to examine the question whether the amount fixed by law is adequate or illusory or that the principles for fixation of the amount are relevant. I am not quite sure about the nature of the presumption when the word "compensation" has been deleted from the sub-article and the word "amount" substituted.

---

[18] (1969) 3 SCR 341, 366: (1969) 1 SCC 509, 529-30 (para 47).

1755. In *The Royal Court Derby Porcelain Co. Ltd.* v. *Raymond Russell*,[19] Denning, L. J., said:

> "I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the Court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms."

1756. See also the speech of Lord Radcliffe in *Galloway* v. *Galloway*.[20] The presumption, if there is any, is always subject to an intention to the contrary.

1757. Counsel for the petitioner argued that as Article 19(1)(*f*) is still retained it would be paradoxical if a law could provide for acquisition or requisition of property on payment of an inadequate or illusory amount. He said, even if the amount given is not the just equivalent in money of the value of the property acquired, it must at least be an amount having a reasonable relation to its value as Parliament cannot be deemed to have intended by the amendment to enable a law being passed fixing an unreasonably low amount as the right to acquire and hold property is still a Fundamental Right under Article 19. If we are to import into the concept of 'amount' the implication of reasonableness with reference to the market value of the property, it would immediately open the door to the justiciability of the question of the adequacy of the amount fixed or determined which the sub-article expressly says it is not open to the Court to go into.

1758. The Fundamental Right to property is attenuated to a certain extent. But it is not wholly taken away. The right that the property could be acquired only under a law fixing an amount or the principles for determining it and for a public purpose would still remain. This Court can strike down an amendment of the Constitution only on the ground that the amendment was not made in the manner and form required by Article 368, or that the amendment was made in violation of some express or implied limitation upon the power of amendment.

1759. A constitutional amendment which provides for the law fixing the 'amount' or the principles for determining the amount instead of compensation or the principles for its determination and which deprives the court of the power of judicial review of the question whether the amount or the principles fixed by law is adequate or are relevant, cannot be adjudged bad on the ground of some invisible radiation from the concept that the right to acquire, hold or dispose of property is a Fundamental Right.

---

[19] (1949) 2 KB 417 at 429.

[20] (1956) AC 299.

1760. If full compensation has to be paid, concentration of wealth in the form of immovable or movable property will be transformed into concentration of wealth in the form of money and how is the objective underlying Article 39(*b*) and (*c*) achieved by the transformation? And will there be enough money in the coffers of the State to pay full compensation?

1761. As the 24th Amendment which empowers Parliament to take away or abridge Fundamental Right has been held by me to be valid. I do not think there is any conceivable basis on which I can strike down the amendment to Article 31(2). Nor can I read any implication into the word 'amount' and say that it must be reasonable as that would imply a standard. Having regard to the neutral and colourless character of the word 'amount' and the express provision excluding judicial review of the question of the adequacy of the amount, the question of reasonableness of the amount or the relevancy of the principle is entirely outside the judicial ken.

1762. Now I turn to the question of the validity of Article 31-C.

1763. Counsel for the petitioner submitted that there is a fundamental distinction between amending Fundamental Rights in such a way as to abridge or take them away and making an amendment in the Constitution which enables Parliament in its legislative capacity and the Legislatures of the States to pass a law violating Fundamental Rights and making it valid. According to counsel what has been done by Article 31-C is to enable Parliament and State Legislatures to make Constitution breaking laws and put them beyond challenge in any Court with the result that laws which would be void as contravening the Fundamental Rights are deemed, by a fiction of law, to be not void and that this is a repudiation of the supremacy of the Constitution which is an essential feature of the Constitution. Counsel further said that Directive Principles which were intended by the Constitution-makers to run as subsidiary to Fundemental Rights have been made paramount to them and laws to implement the Directive Principles specified in Article 39(*b*) and (*c*) are made immune from attack, even if they violate Fundamental Rights under Articles 14, 19 and 31. He further said that a declaration by Parliament or the State Legislatures that a law is to give effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*) has been made final which, in effect, means that Parliament and State Legislatures can pass any laws in the exercise of their legislative power, whether they give effect to the policy of State towards securing the Directive Principles contained in Article 39(*b*) and (*c*) or not, and get immunity for those laws from attack under Articles 14, 19 and 31.

1764. I should have thought that Article 31-C is a proviso to Article 13(2) in that it enables Parliament or State Legislatures to pass law of a particular type which would not be deemed to be void even if they violate the provisions of Articles 14, 19 and 31.

1765. I have no doubt that 'law' in Article 31-C can only mean a law passed by Parliament or the State Legislatures. The word must take its colour from the context.

1766. The makers of the Constitution imposed ban by Article 13(2) upon the 'State' passing a law in contravention of the rights conferred by Part III. If 24th Amendment which enables Parliament to make an amendment of the Fundemental Rights in such a way as to take away or abridge them is valid, what is there to prevent Parliament from enacting a constitutional amendment making it possible for Parliament or State Legislatures to pass laws for implementing the Directive Principles specified in Article 39(*b*) and 39(*c*) which would be immune from attack on the ground that those laws violate Articles 14, 19 and 31? Is it not open to the Amending Body to enact an amendment saying in effect that although all laws passed by Parliament and State Legislatures, which violate fundamental rights are void, laws passed by Parliament and State Legislatures for giving effect to the policy of the State towards securing directive principles specified in Article 39(*b*) and (*c*) would not be void, even if they contravene some of the fundamental rights, namely, those under Articles 14, 19 and 31? Article 31-C merely carves out a legislative field with reference to a particular type of law, and exempts that law from the ambit of Article 13(2) in some respects. Parliament or State Legislatures pass a law for giving effect to the Directive Principles specified in Article 39(*b*) or (*c*), not by virtue of Article 13-C, but by virtue of their power under the appropriate legislative entries. What Article 31-C does is to confer immunity on those laws from attack on the ground that they violate the provisions of Articles 14, 19 and 31.

1767. The material portion of Article 31-A is in pari materia with the first part of Article 31-C. Article 31-A has been held to be valid by this Court in *Sankari Prasad's case*.[21] The fact that the argument now urged did not occur to counsel who appeared in the case or the great judges who decided it is a weighty consideration in assessing its validity. To make a distinction between Article 31-A on the ground that Article 31-A provides for laws dealing with certain specified subjects only whereas Article 31-C makes provisions for laws to give effect to the State policy for securing the directive principles specified in Article 39(*b*) and (*c*), is to my mind, to make a distinction between Tweedledum and Tweedledee. One can very well say that the subject-matter of the law referred to in Article 31-C is that dealt with by Article 39(*b*) and (*c*) or that Article 31-A provides for immunity of the laws for securing the objects specified therein from attack on the ground that they violate Articles 14, 19 and 31. Does the artificial characterisation of a law as one with reference to the object or subject make any difference in this context? I think not.

1768. It is a bit difficult to understand how Article 31-C has delegated or, if I may say so more accurately, invested the Parliament in its legislative capacity or the State Legislatures with any power to amend the Constitution. Merely because a law passed by them to give effect to the policy of the State towards securing the Directive Principles specified in Article 39(*b*) and (*c*) in pursuance to valid legislative entries in the appropriate Lists in the Seventh Schedule might violate the Fundamental Rights under Articles 14, 19 and 31 and such law is deemed not void by virtue of Article 31-C, it would not follow that Article 31-C has invested the Parliament in its legislative capacity or the State Legislatures with power to amend the Constitution. It is by virtue of the 25th Amendment that the law, although it might violate the Fundamental Rights under Articles 14, 19 and 31 is not deemed void. Whenever Parliament or State Legislatures pass such a law, the law so passed gets immunity from attack on the ground that it violates the Fundamental Rights under Articles 14, 19 and 31 by virtue of Article 31-C which in effect has made a pro-tanto amendment of Article 13(2) in respect of that category of laws. It is a mistake to suppose that every time when Parliament in its legislative capacity or a State Legislature passes such a law and if the law violates the Fundamental Rights under Articles 14, 19 and 31, it is that law which amends the Constitution and makes it valid. The amendment of the relevant provisions of the Constitution, namely Article 13(2), has already been made by the 25th Amendment. And as I said it is that amendment which confers upon the law immunity from attack on the ground that it violates the Fundamental Rights under the above said articles.

---

[21] 1952 SCR 89: AIR 1951 SC 458: 1951 SCJ 775.

1769. Parliament in its legislative capacity or the State Legislatures cannot confer any immunity upon the laws passed by them from the attack and they do not do so. They rely upon the 25th Amendment as conferring the immunity upon the law which gives effect to the State policy towards securing the above mentioned purpose. I confess my inability to understand the distinction between a law passed in pursuance of an amendment of the Constitution which lifts the ban of Article 13(2) and a law passed in pursuance of an amendment which says that the law shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by the articles in Part III. The distinction, to my mind, is invisible. Take one illustration: Article 15(4) says:

> "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes."

Suppose the sub-article had said:

> "Notwithstanding anything contained in this article, or clause (2) of Article 29, the State shall be competent to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and such a law shall not be deemed to be void under Article 13(2)."

In both the cases, the amendment has brought about the same effect, namely, the law shall not be deemed to be void for contravention of the right conferred by Article 15 or Article 29(2), notwithstanding the difference in the wording by which the effect was brought about. And, in both cases it is the amendment of the Constitution which gives the law the immunity from attack on the ground that it is in contravention of the rights conferred by Part III.

1770. If Article 31-C is assumed to invest Parliament in its legislative capacity or State Legislatures with power to pass a law of the description in question amending Fundamental Rights under Articles 14, 19 and 31 in such a way as to take away or abridge them is the grant of such a power valid? The answer seems to me to be simple. If the effect of Article 31-C is as assumed, then it is a pro-tanto amendment of Article 368. It is not necessary that Article 31-C should in such a case purport to amend Article 368.[22] Nor is it necessary that Article 31-C should commence with the words "Notwithstanding anything contained in Article 368". Just as the Dog Act under an uncontrolled Constitution, *pro-tanto* amends the so-called Constitution if it is inconsistent with it, so also under a controlled Constitution an amendment of the Constitution, if inconsistent with any provision of the Constitution would *pro-tanto* amend it. The 25th Amendment was passed in the manner and form required for amendment of Article 368. I cannot read any limitation upon the power to amend the amending power which would preclude Article 368 from being amended in such a way as to invest part of the amending power in Parliament in its ordinary legislative capacity or in State Legislature, to be exercised by them in a form and manner different from that prescribed by Article 368.

---

[22] See *Mohamed Samsudeen Kariapper* v. *S. S. Wijesinha and Another*, (1968) AC 717, 739 to 744.

1771. The supposed bad odour about the article should not upset our judgment in adjudging its constitutionality. We have no power under the Constitution to adjudge a constitutional amendment as unconstitutional on the ground that the amendment would in effect vest large powers in Parliament and State Legislatures to pass laws which might violate Articles 14, 19 and 31.

1772. Counsel for the petitioner asked the question why the right to pass laws violating the freedom of speech guaranteed under Article 19(1)(*a*) is given to Parliament in its legislative capacity and to the State Legislatures by Article 31-C when it is seen that clauses (*b*) and (*c*) of Article 39 are concerned with matters which have no connection with that freedom.

1773. In my dissenting judgment in *Bennett Coleman & Co. and Others* v. *Union of India and Others etc.*[23] I had occasion to deal with certain aspects of the modern press. Mr. Seervai has rightly emphasized its commercial character and how that aspect, though connected with freedom of speech might require control. Though the press stands as the purveyor of truth and the disinterested counsellor of the people, it is now primarily a business concern, an undertaking conducted for profit like any other, that the proprietor is a man of business and though he may desire power as well as money, profit comes before political opinions. According to Lord Bryce the power of the newspaper has two peculiar features. It has no element of compulsion and no element of responsibility. Whoever exposes himself to its influence does so of his own free will. He need not buy the paper, nor read it, nor believe it. If he takes it for his guide, that is his own doing. The newspaper, as it has no legal duty, is subject to no responsibility, beyond that which the law affixes to indefensible attacks on private character or incitements to illegal conduct. The temptations to use the influence of a newspaper for the promotion of pecuniary interests, whether of its proprietors or of others, have also increased. Newspapers have become one of the most available instruments by which the Money power can make itsef felt in politics, and its power it practically irresponsible, for the only thing it need fear is the reduction of circulation, and the great majority of its readers, interested only in business and sport, know little of and care little for the political errors it may commit.[24]

1774. The news content of the press enters at once into the thought processes of the public. The fullness and unbent integrity of the news thus becomes a profound social concern. That which is a necessary condition of performing a duty is a right; we may therefore speak of the moral right of a people to be well served by its press. Since the citizen's political duty is at stake, the right to have an adequate service of news becomes a public responsibility as well. So freedom of the press must now cover two sets of rights and not one only. With the rights of editors and publishers to express themselves there must be associated a right of the public to be served with a substantial and honest basis of fact for its judgments of public affairs. Of these two, it is the latter which today tends to take precedence in importance. The freedom of the press has changed its point of focus from the editor to the citizen. This aspect of the question was considered by the United States Supreme Court in *United States* v. *Associated Press.*[25] Mr. Justice Black who wrote the majority opinion sees the welfare of the public as the central issue. The fundamental acknowledgment that press functions are now, in the eyes of the laws as well as common-sense "clothed with a public interest" suggest an affirmative obligation on the part of the Government.

---

[23] (1972) 2 SCC 788.

[24] *See* Lord Bryce, "*Modern Democracies*", Vol. 1, the Chapter on "*The Press in a Democracy*", pp. 104-124.

1775. Nobody demurs when a law preventing adulteration of food is passed. Is the adulteration of news, the everyday mental pabulum of the citizen, a less serious matter? The need of the consumer to have adequate and uncontaminated mental food is such that he is under a duty to get it. Because of this duty his interest acquires the status of a right since the consumer is no longer free not to consume and can get what he requires only through the existing press organs, the protection of the freedom of the issuer is no longer sufficient to protect automatically the consumer or the community. The general policy of *laiseez faire* in this matter must be reconsidered. The press is a public utility in private hands and cannot be left free from all kinds of regulation. The ante-thesis between complete *laiseez faire* and complete governmental operation or control of the press is for our society unreal. Therefore, the question is whether, without intruding on the press activity, the State may regulate the conditions under which those activities take place so that the public interest is better served.[26] As I said in my judgment, concentration of power substitutes one controlling policy for many independent policies, it lessens the number of competitors. The influential part of the nation's press is large scale enterprise closely inter-locked with the system of finance and industry. It will not escape the natural bias of what it is. Yet, if freedom is to be secure, the bias must be known and overcome. It may also be necessary for the State to extend the scope of present legal remedies, if a given type of abuse amounts to poisoning the wells of public opinion. It might be necessary in passing a law for giving effect to the State policy towards securing the Directive Principles contained in Article 39(*b*) and (*c*) to deal with the commercial aspect of the press, and that aspect being connected with the freedom of speech, it might become inevitable for the law to abridge that freedom.

1776. Whatever one's personal views might be about the wisdom of Article 31-C, whatever distrust one might have in the attempt at improving society by what one may think futile if not mischievous economic tinkering, it is not for us to prescribe for the society or deny the right of experimentation to it within very wide limits.

1777. It was said that, as Article 31-C bars judicial scrutiny of the question that a law containing the declaration gives effect to the policy of the State, Parliament and State Legislatures can pass laws having no nexus with the Directive Principles specified in Article 39(*b*) or (*c*) and violate with impunity the Fundamental Rights under Articles 14, 19 and 31.

1778. The purpose of Article 31-C is only to give immunity to a law for giving effect to the policy of the State towards securing the Directive

---

[25] 326 US 20.
[26] *See* Hocking: "*The Freedom of the Press*", pp. 167-9.

Principles under Article 39(*b*) and (*c*) from attack on the ground that its provisions violate Articles 14, 19 and 31. A law which will never give effect to the State policy towards securing these principles will enjoy no immunity, if any of its provisions violates these articles. It is only a law for giving effect to the State policy towards securing the principles specified in Article 39(*b*) and (*c*) that can contain a declaration that it is for giving effect to such a policy and it is only such a declaration that will bar the scrutiny by the Court of the question that the law does not give effect to the policy. The expression 'no law' in the latter part of Article 31-C can only mean the type of law referred to in the first part. To be more specific the expression 'no law' occurring in the latter part of the article can only mean 'no such law' as is referred to in the first part. It would be very strange were it otherwise. If any other construction were to be adopted, a declaration could shield any law, even if it has no connection with the principles specified in Article 39(*b*) or (*c*) from attack on the ground of violation of these articles. Any law under the Sun can be brought under the protective umbrella of the declaration. Therefore, as I said, it is only a law for giving effect to the policy of the State towards securing the principles specified in clauses (*b*) and (*c*) of Article 39, that can contain a declaration. If a declaration is contained in any law which does not give effect to the policy of the State towards securing the Directive Principles specified in these clauses, the Court can go into the question whether the law gives effect to the said policy. Whenever a question is raised that the Parliament or State Legislatures have abused their power and inserted a declaration in a law not for giving effect to the State policy towards securing the Directive Principles specified in Article 39(*b*) or (*c*), the Court must necessarily go into that question and decide it. To put it in other words, the legislative jurisdiction to incorporate a declaration that the law gives effect to the policy of the State is conditioned upon the circumstance that the law gives effect to the policy of the State towards securing the Directive Principles specified in Article 39(*b*) and (*c*). If this is so, the declaration that the law is to give effect to the policy of the State cannot bar the jurisdiction of the Court to go into the question whether the law gives effect to the policy. The declaration can never oust the jurisdiction of the court to see whether the law is one for giving effect to such a policy, as the jurisdiction of the Legislature to incorporate the declaration is founded on the law being one to give effect to the policy of the State towards securing these principles.

1779. In order to decide whether a law gives effect to the policy of the State towards securing the Directive Principles specified in Article 39(*b*) or (*c*), a Court will have to examine the pith and substance, the true nature and character of the law as also its design and the subject-matter dealt with by it together with its object and scope. If the Court comes to the conclusion that the declaration was merely a pretence and that the real purpose of the law is the accomplishment of some object other than to give effect to the policy of the State towards securing the Directive Principles in Article 39(*b*) and (*c*), the declaration would not be a bar to the Court from striking down any provision therein which violates Articles 14, 19 or 31. In other words, if a law passed ostensibly to give effect to the policy of the State is, in truth and substance, one for accomplishing an unauthorised object, the Court would be entitled to tear the veil created by the declaration and decide according to the real nature of the law.

1780. Apart from the safeguard furnished by judicial scrutiny, there is sufficient guarantee in Article 31-C that a State Legislature will not abuse the power as the law passed by it will be valid only when it has been reserved for the assent of the President and has obtained his assent. In the light of what I have said, the apprehension expressed in some quarters and if judicial scrutiny of the question whether the law gives effect to the policy of the State towards securing these Directive Principles is barred, it will lead to the disintegration of the country has no real foundation. Nor has the dictum of Justice Holmes.[27] "I do not think that the United States would come to an end if the Supreme Court lost our power to declare an Act of the Congress void. But I do think that the Union would be imperilled if we could not make that declaration as to the laws of the several States", any relevance in the context.

1781. It was said that the Constitution-makers never intended that Fundamental Rights should be subservient to Directive Principles and that they visualized a society where the rights in Part III and the aspirations in Part IV would co-exist in harmony. (The doctrine of harmonious construction has been a *panacea* for many of our ills. But I am not sure of its efficacy). A succeeding generation might view the relative importance of the Fundamental Rights and Directive Principles in a different light or from a different perspective. The value judgment of the succeeding generations as regards the relative weight and importance of these rights and aspirations might be entirely different from that of the makers of the Constitution. And it is no answer to say that the relative priority value of the Directive Principles over Fundamental Rights was not apprehended or even if apprehended was not given effect to when the Constitution was framed or to insist that what the Directive Principles meant to the vision of that day, it must mean to the vision of our time.

1782. I have no doubt in my mind as regards the validity of the 29th Amendment. For the reasons given in the judgment of my learned brother Ray, J., I hold that the 29th Amendment is valid.

1783. The argument in these cases lasted for well nigh six months. Acres of paper and rivers of ink have been employed before and during the argument in supplying the Court with materials from all sources. It will be a tragedy if our conclusion were to fail to give adequate guidance to the Bench concerned in disposing of these cases. I do not, therefore, want the conclusions to which I have reached to remain a Delphic oracle. I would, therefore, sum up my findings.

1784. I hold that the decision in *Golaknath case* (supra) that the Parliament had no power to amend Fundamental Rights in such a way as to take away or abridge them was wrong, that the power to amend under Article 368 as it stood before the 24th Amendment was plenary in character and extended to all the provisions of the Constitution, that the 24th Amendment did not add anything to the content of Article 368 as it stood before the amendment, that it is declaratory in character except as regards the compulsory nature of the assent of the President to a bill for amendment and that the article as amended makes it clear that all the provisions of the Constitution can be amended by way of addition, variation or repeal. The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. That limitation flows from the language of the article itself.

1785. I do not think there were or are any implied or inherent limitations upon the power of amendment under the article.

---

[27] Holmes : "*Collected Legal Papers*", pp. 295-296.

1786. The 24th Amendment is valid.

1787. The 25th Amendment, including Article 31-C, is valid. The word 'amount' in Article 31(2), as amended, does not convey the idea of any norm. The fixation of the amount or the principle for determining the amount is a matter within the absolute discretion of the Parliament or the State Legislatures. The Court cannot go into the question whether the amount fixed by law or the principle laid down for determining the amount is adequate or relevant.

1788. The declaration visualized in Article 31-C that the law gives effect to the policy of the State towards securing the principles specified in Article 39(*b*) and (*c*) of the Constitution would not oust the jurisdiction of the Court to go into the question whether the law gives effect to the policy. The jurisdiction of Parliament or the State Legislatures to incorporate the declaration in a law is conditioned upon the circumstance that the law is one for giving effect to the State Policy towards securing the aforesaid principles.

1789. The 29th Amendment is valid.

1790. I would have the writ petitions disposed of in the light of these findings. I would make no order as to costs here.

Beg, J.—This reference to a special bench of thirteen Judges, larger than any previous bench hearing a case in this Court, was made so that the correctness of a view which became binding law of this country by a narrow majority of one, as a result of the eleven Judge decision of this Court, in *Golak Nath & Others.* v. *State of Punjab & Another*,[81] may if need be reconsidered. That view was that the prohibition contained in Article 13(2) of our Constitution against the making of any law by the State "which takes away or abridges the rights conferred" by the chapter on Fundamental Rights making laws made in contravention of this provision void "to the extent of the contravention" applies to constitutional amendments also. Although that was a decision on a limitation held to exist, under our Constitution, as it then stood, on the power of amendment contained in Article 368 of the Constitution, yet, it did not decide what the position would be, if Article 368 was itself amended under the express power of such amendment recognised by clause (*e*) of the proviso to Article 368(2) of the Constitution. Although, that question, which then neither arose nor was decided, is before us now directly for decision, yet, I think, we cannot avoid pronouncing upon the correctness of the majority decision in the *Golak Nath's case* (supra), which has a bearing upon the scope of the power of amendment contained in the unamended Article 368.

1792. The cases before us have become so much loaded with learning and marked by brilliance of exposition of all the point involved, either directly or indirectly, both by my learned brethren and the members of the Bar of this Court, in view of the crucial importance, for the future constitutional history of this country, for the issues placed before us, that it would be presumptuous on my part to attempt to deal with every point which has been raised. Indeed, it is not necessary for me to repeat such views as I accept as correct expressed by my learned brethren with whose conclusion I agree.

---

[81] (1967)2 SCR 762 : AIR 1967 SC 1643 : (1967)2 SCJ 486.

The reasons for my very respectful disagreement with those conclusions of some of my other learned brethren with which I do not concur will become evident in the course of the few observations with which I shall content myself before recording my conclusions. I venture to make these observations because, as my learned Brother Mathew has pointed out, in cases of the nature before us, the healthier practice is to follow the example of House of Lords even though a multiplicity of opinions may produce a "thicket" which, according to Judge Learned Hand, it is the function of judicial learning and wisdom to remove. I do hope that my observations will not add to the thickness of this thicket without some useful purpose served by making them.

1793. I think that we do stand in danger, in the circumstances stated above, of losing sight of the wood for the trees, and, if we get entangled in some of the branches of the trees we may miss reaching the destination: the correct conclusion or decision. I think I can speak for all my learned brethren as well as myself when I say that we are all conscious of the anormous burden which rests upon our shoulders in placing before the country the solution or solutions which may not only be correct but beneficial for it without doing violence to the law embodied in our Constitution to which we take an oath of allegiance.

1794. I am reminded here of what Prof. Friedmann wrote in "*Law in a Changing Society*". He said at page 61 (p. 90 of 2nd. Edn.)

> "The task of the modern judge is increasingly complex. Hardly any major decision can be made without a careful evaluation of the conflicting values and interests of which some examples have been given in the preceding pages. Totalitarian government eliminates much of the conflict by dictating what should be done."
>
> "The lot of the democratic judge is heavier and nobler. He cannot escape the burden of individual responsibility, and the great, as distinct from the competent, judges have, I submit, been those who have shouldered that burden and made their decisions as articulate a reflection of the conflicts before them as possible. They do not dismiss the techniques of law, but, they are aware that by themselves, they provide no solution to the social conflicts of which the law is an inevitable reflection."

He also wrote there (at page 62):

> "The law must aspire at certainty, at justice, at progressiveness, but these objectives are constantly in conflict one with the other. What the great judges and jurists have taught is not infallible knowledge, or a certain answer to all legal problems, but an awareness of the problems of contemporary society and an acceptance of the burden of decision which no amount of technical legal knowledge can take from us."

1795. The 'Core', a term and concept which Mr. Palkivala has tried to impress upon us repeatedly with his extraordinary forensic ability and eloquence, or crux of the problem before us is thus stated in writing, in Part 10 of Book 3, containing the concluding written submissions of Mr. Palkhivala.

> "It is submitted that it would be impossible to dispose of these petitions without dealing with the most crucial question—the true ambit of the amending power. This question can be decided either on the ground of the meaning of the word "amendment" in the unamended

Article 368 or on the ground of inherent and implied limitations or on both the grounds, since they converge on the same point.''

"It is submitted with great respect that it would be impossible to deal with the questions relating to the 24th and 25th Amendments without deciding the true ambit of the amending power.''

"The questions of the correct interpretation of the 24th Amendment and its validity cannot be decided unless this Hon'ble Court first comes to a conclusion as to whether the original power was limited or unlimited. If it was originally limited the question would arise whether the 24th Amendment should be "read down'' or whether it should be held to be unconstitutional. Even the question of the correct construction of the 24th Amendment cannot be decided unless the starting point is first established, namely, the true scope of the original amending power.''

"Again, it would be impossible to decide the question whether Article 31(2) which has been altered by the 25th Amendment should be "read down'' in such a way as to preserve the right to property or should be declared unconstitutional as abrogating the right to property, —unless and until it is first decided whether Parliament has the right to abrogate the right to property. This directly involves the question whether the amending power is limited or unlimited.''

"When one comes to Article 31-C the necessity of deciding the the limits of the amending power becomes unmistakable. The Article violates seven essential features of the Constitution and makes the Constitution suffer a loss of identity. There can be no question of 'reading down' Article 31-C. It can only be held to be unconstitutional on the ground that Parliament's amending power was limited.''

"*To decide the question of the validity of Article 31-C only on the ground that it virtually provides for amendment of the Constitution in a "manner and form'' different from that prescribed by Article 368 would be a most unsatisfactory ground of decision.* The question of prime importance is the limit on the amending power. *The question of manner and form pales into total insignificance compared to the question of substantive limitation on the amending power.*''

"It is submitted with the greatest respect that the 69 days' hearing would be virtually wasted if the judgment were to rest, merely on the point of manner and form, avoiding the real issue of momentous significance, namely, the scope of the amending power. It is this vital issue which has really taken up the time of the Court for almost five months.''

1796. Before tackling the core or crux of the case which, as Mr. Palkhivala has rightly pointed out, is the question of the limits of the amending power found in Article 368 of the Constitution, I must make some preliminary observations on the very concepts of a Constitution and of legal sovereignty embodied in it, and the nature of the amending power as I conceive it. This and other parts of my judgment may also disclose what I think a judge should not hesitate to explore and expose leaving it merely to be inferred from the judgment as his "undisclosed major premises". It is part of judicial function, in my estimation, to disclose and to justify to the citizens of this country what these premises are.

1797. I think that it is clear from the Preamble as well as the provisions of Parts III and IV of our Constitution that it seeks to express the principle:

"*Salus Populi Suprema Lex*". In other words, the good of the mass of citizens of our country is the supreme law embodied in our Constitution prefaced as it is by the Preamble or the 'key' which puts "justice, social, economic and political" as the first of the four objectives of the Constitution by means of which "the people" of India constituted "a Sovereign Democratic Republic".

1798. A modern democratic Constitution is, to my mind, an expression of the sovereign will of the people, although, as we all know, our Constitution was drawn up by a Constituent Assembly which was not chosen by adult franchise. Upon this Constituent Assembly was conferred the legal power and authority, by Section 8 of the Indian Independence Act, passed by the British Parliament, to frame our Constitution. Whether we like it or not, Sections 6 and 8 of the Act of the British Parliament transferred, in the eye of law, the legal sovereignty, which was previously vested in the British Parliament, to the Indian Parliament which was given the powers of a Constituent Assembly for framing our Constitution.

1799. The result may be described as the transfer of political as well as legal sovereignty from one nation to another, by means of their legally authorised channels. This transfer became irrevocable both as a matter of law and even more so of fact. Whatever theory some of the die-hard exponents of the legal omnipotence of the British Parliament may have expounded, the modern view, even in Britain, is that what was so transferred from one nation to another could not be legally revoked. The vesting of the power of making the Constitution was, however, legally in the Constituent Assembly thus constituted and recognised and not in "the people of India", in whose name the Constituent Assembly no doubt spoke in the Preamble to the Constitution. The Constituent Assembly thus spoke for the whole of the people of India without any specific or direct legal authority conferred by the people themselves to perform this function.

1800. The voice of the people speaking through the Constituent Assembly constituted a new "Republic" which was both "Sovereign and Democratic". It no doubt sought to secure the noble objectives laid down in the Preamble primarily through both the Fundamental Rights found in Part III and the Directive Principles of State Policy found in Part IV of the Constitution. It would, however, not be correct, in my opinion, to characterise, as Mr. Palkhiwala did, the Fundamental Rights contained in Part III, as merely the means whereas the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution. On the other hand, it appears to me that it would be more correct to describe the Directive Principles as laying down the path which was to be pursued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble. Indeed, from the point of view of the Preamble, both the Fundamental Rights and the Directive Principles are means of attaining the objectives which were meant to be served both by the Fundamental Rights and Directive Principles.

1801. If any distinction between the fundamental rights and the Directive Principles on the basis of a difference between ends or means were really to be attempted, it would be more proper, in my opinion to view fundamental rights as the ends of the endeavours of the Indian people for which the Directive Principles provided the guidelines. It would be still better to view both fundamental rights and the "fundamental" Directive Principles as guidelines.

1802. Perhaps, the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the State and the Directive Principles, would be to look upon the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path, like the banks of a flowing river, which could be amended or mended by displacements, replacements or curtailments or enlargements of any part according to the needs of those who had to use the path. In other words, the requirements of the path itself were more important. A careful reading of the debates in the Constituent Assembly also leads me to this premise or assumption. If the path needed widening or narrowing or changing, the limits could be changed. It seems to be impossible to say that the path laid down by the Directive Principles is less important than the limits of that path. Even though the Directive Principles are "non-justiciable", in the sense that they could not be enforced through a Court, they were declared, in Article 37, as "the principles……… fundamental in the governance of the country". The mandate of Article 37 was "it shall be the duty of the State to apply these principles in making laws". Primarily the mandate was addressed to the Parliament and the State Legislatures, but, in so far as Courts of Justice can indulge in some judicial law making, within the interstices of the Constitution or any Statute before them for construction, the Courts too are bound by this mandate.

1803. Another distinction, which seems to me to be valid and very significant is that, whereas, the fundamental rights were "conferred" upon citizens, with corresponding obligations of the State, the Directive Principles lay down specific duties of the State organs. In conferring fundamental rights, freedom of individual citizens, viewed as individuals, were sought to be protected, but, in giving specific directives to State organs, the needs of social welfare, to which individual freedoms may have to yield, were put in the fore-front. A reconciliation between the two was, no doubt, to be always attempted whenever this was reasonably possible. But, there could be no doubt, in cases of possible conflict, which of the two had to be subordinated, when found embodied in laws properly made.

1804. Article 38 shows that the first of the specific mandates to State organs says:

> "38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

In other words, promotion of a social order in which "justice, social, economic, and political" was the first duty of all the organs of the State.

1805. The second specific mandate to State organs, found in Article 39, contains the principles of what is known as the socialistic "welfare State". It attempts to promote social justice by means of nationalisation and State action for a better distribution of material resources of the country among its citizens and to prevent the exploitation of the weak and the helpless. It runs as follows:

> "39. The State shall, in particular, direct its policy towards securing—
>
> (*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood;

SCC Online

> (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
>
> (*d*) that there is equal pay for equal work for both men and women;
>
> (*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
>
> (*f*) that childhood and youth are protected against exploitation and against moral and material abandonment."

1806. On the views stated above, it would be difficult to hold that, the necessarily changeable limits of the path, which is contained in the Directive Principles, are more important than the path itself. I may mention here that it was observed in one of the early Full Bench decisions of the Allahabad High Court in *Motilal & Others.* v. *The Government of the State of Uttar Pradesh & Others.*[82] by Sapru, J., :

> "I shall also say a few words about the directives of State policy which, though not justiciable, may be taken into account in considering the Constitution as a whole. These directives lay down the principles which it will be the duty of the State to apply in the making of laws and their execution. Article 38 states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life."
>
> "Article 39 lays down the principles which must inspire State policy. Articles 40 to 51 concern themselves with such questions, inter alia, as, for example, the right to work, to education and to public assistance, the promotion of educational and economic interest of scheduled castes and the duty of the State to raise the level of nutrition and to improve public health."
>
> "My object in drawing attention to the nature of these objectives is to show that what the framers of the Constitution were after was to establish, what is generally known, now as the 'welfare' or the 'social service State', in this country. They had taken a comprehensive view of State activities and it is quite clear that they were not dominated by the *laissez-faire* thought of the last century. So much about Directives. Now we come to fundamental rights."
>
> "The object of these fundamental rights, as far as I can gather from a reading of the Constitution itself, was not merely to provide security to and equality of citizenship of the people living in this land and thereby helping the process of nation building, but also and not less importantly to provide certain standards of conduct, citizenship, justice and fair play. In the background of the Indian Constitution, they were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privilege and has laid down that there

---

[82] AIR 1951 All 257, 296: ILR (1951) 1 All 269.

is to be perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and moral perfection of man."

1807. Indeed, in *Balwant Raj* v. *Union of India*[83] Dhavan, J., went so far as to hold that "the duty of the State" under Article 37 to apply these principles in "making laws" was to be carried out even by the judiciary of the State whenever it had a choice between two possible constructions, that is to say, when it could indulge in judicial "law making".

1808. The next topic on which I will venture to make some observations is the significance and meaning of the word "sovereign". What was constituted by the Constituent Assembly, speaking for the people of India, was a "Sovereign Democratic Republic"

1809. Here, I may mention the well-known distinction between "political sovereignty" and "legal sovereignty". Dicey in his *Law of the Constitution* (tenth edition), discussing the nature of Parliamentary Sovereignty said (at page 73):

> "The matter indeed may be carried a little further, and we may assert that the arrangements of the Constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will be expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some part of his work Austin has apparently confused the one sense with the other."

1810. Legally, the British Parliament transferred the whole of its legal sovereignty over the people and territories of this country in British India to the Constituent Assembly which spoke in the name of the people of India. The Princely States came in through "Instruments of accession". This means that the legal sovereignty was vested in the Constituent Assembly whereas the people of India may be said to be only politically "sovereign". Their views were carefully ascertained and expressed, from various angles, by the Members of the Constituent Assembly. The political sovereign thus operated outside the ambit of law yet made its impact and effect felt upon the legal sovereign, that is to say, the Constituent Assembly. In recognition of this fact and to bring out that it was really speaking on behalf of the people of India, the Constituent Assembly began the Preamble with the words: "We, the people of India". This meant, in my estimation, nothing more than that the Constituent Assembly spoke for the people of India even though it was vested with the legal authority to shape the destiny of this country through the Constitution framed by it. There is not to be found, anywhere in our Constitution, any transfer of legal sovereignty to the people of India.

---

[83] AIR 1968 All 14: (1967)2 Lab LJ 363: 1968 Lab IC 9.

1811. The people of India speak through their representatives in the two Houses of Parliament. They approach the courts for the assertion of their rights. The courts adjudicate upon the rights claimed by them and speak for the Constitution and not directly for the people. Judges and other dignitaries of State as well as Members of Parliament take oaths of allegiance to the Constitution and not to the people of India. In other words, the Constitution is the "legal sovereign" recognised by courts, although the ultimate 'political' sovereignty may and does reside in "the people".

1812. We need not, I think, embark on any academic discourse upon the various meanings of the term 'sovereignty' which has given much trouble to political thinkers and jurists such as Duguit, Gierke, Maitland, Laski, Cole and others. I will be content with quoting the views of *Prof. Ernest Barker* expressed in his *"Principles of Social & Political Theory"* on the nature and meaning of the term "sovereignty", as the lawyers generally understand it. He says (at page 59):

> "There *must* exist in the State, as a legal association, a power of final legal adjustment of all legal issues which arise in its ambit. The legal association will not be a single unit, and law will not be a unity, unless there is somewhere *one* authority to which crucial differences ultimately come, and which gives, as the authority of last resort, the ultimate and final decision. Different social groups may press different views of what is, or ought to be, law; it is even possible that different departments of the State may hold, and seek to enforce, differet notions of what is legally right; there must be a final adjustment-centre. That final adjustment-centre is the sovereign, the topmost rung of the ladder, the *superanus* or *sovrano*, the 'authority of the last word'. Sovereignty is not the same as general State-authority, or *puissance publique*: it is the particular sort of State-authority which is the power and the right, of ultimate decision."
>
> "In one sense sovereignty is unlimited—unlimited and illimitable. There is no question arising in the legal association, and belonging to the sphere of its operation, which may not come up to the sovereign, and which will not be finally decided by the sovereign, if it so comes up to the topmost rung. The adjustment-centre must be competent to adjust every issue, without exception, which may stand in need of adjustment. But there are other considerations also to be noticed; and these will show us that sovereignty, if it is not limited to particular questions and definite objects (limited, that is to say, in regard to the *things* which it handles), is nonetheless limited and defined by its own *nature* and its *mode of action*."
>
> "In the first place, and as regards its *nature*, sovereignty is the authority of the last word. Only questions of the last resort will therefore be brought to the sovereign. Much will be settled in the lower ranges and in the ordinary course of the action of general State-authority. In the second place, and as regards its *mode of action*, the sovereign is a part and organ of the legal association. Nothing will therefore come to the sovereign which does not belong to the nature and operation of the legal association, *as such*. Sovereignty moves within the circle of the legal association, and only within that circle; it decides upon questions of a legal order, and only upon those questions. Moving within that circle, and deciding upon those questions, sovereignty will

only make legal pronouncements, and it will make them according to regular rules of legal procedure. It is not a capricious power of doing anything in any way: it is a legal power of settling finally legal questions in a legal way."

Prof. Ernest Barker went on to say (pp. 61-63):

> "(*a*) Ultimately, and in the very last resort, the sovereign is the constitution itself—the constitution which is the efficient and formal cause of the association; which brings it into being; which forms and defines the organs and methods of its operation, and may also form and define (if the Constitution either contains or is accompanied by a 'declaration of rights') the purposes of its operation. It may be objected to this view that the sovereign is a body of living persons, and not an impersonal scheme; and that ultimate sovereignty must accordingly be ascribed, not to the Constitution, but to the Constitution-making body behind it which can alter and amend its provisions. But there is an answer to that objection. The impersonal scheme of the Constitution is permanently present, day by day, and year by year; its acts continuously, and without interruption, as the permanent control of the whole operation of the State. The body of persons which can alter and amend the Constitution (and which, by the way, can act only under the Constitution, and in virtue of the Constitution) is a body which acts only at moments of interruption and therefore at rare intervals. The continuous control may more properly be termed sovereign than the occasional interruption; and we may accordingly say that the Constitution itself, in virtue of being such a control, is the ultimate sovereign."
>
> "(*b*) Secondarily, however, and subject to the *ultimate* sovereignty of the Constitution we may say that the body which makes ordinary law, in the sense of issuing the day-to-day and the year-by-year rules of legal conduct, is the *immediate* sovereign, That body may be differently composed in different political systems. In the United States, for example, it is composed of Congress and President acting independently (though with mutual checks and reciprocal powers of overriding one another's authority) on a system of co-ordination. In the United Kingdom it is composed of Parliament and His Majesty's Ministers acting interdependently, and with a mutual give and take (though here too there are mutual checks, the Parliament can dismiss the Ministers by an adverse vote as vice versa they can dismiss Parliament by advising His Majesty to use his power of dissolution), on a system which is one of connexion rather than co-ordination. However composed, the body which makes the ordinary law of the land is the immediate sovereign, which issues final legal pronouncements on ordinary current questions to the extent and by the methods authorized under the Constitution. The immediate sovereign which makes the ordinary law in the United Kingdom is authorized by the Constitution to a greater extent of action, and to action by easier and speedier methods, than the immediate sovereign which makes the ordinary law in the United States; but in either case the immediate sovereign is a body authorized by the Constitution, acting and able to act because it is so authorized."
>
> "On the argument which is here advanced the Constitution is the *ultimate* sovereign, in virtue of being the permanent scheme, or standing expression, of what may be called the primary law of the political

association; and the laws and rule-making body is the *immediate* sovereign, in virtue of being the constant source and perennially active fountain of what may be called the secondary law of the land. Two difficulties, confront the argument, one of them largely formal, but the other more substantial. The first and largely formal difficulty is that it would appear to be inconsistent to begin by ascribing ultimate sovereignty to the Constitution rather than to the Constitution-making body, and then to proceed to ascribe immediate sovereignty to the law-and-rule making body rather than to the law. Does not consistency demand either that both sovereigns should be "impersonal systems, or that both should be personal bodies; either that the ultimate sovereign should be 'the rule of the Constitution' and the immediate sovereign 'the rule of law', or that the ultimate sovereign should be the Constitution-making body and the immediate the law and rule-making body? We may answer that inconsistency is inherent in the nature of the case. The position of the primary law of the State is different from that of the secondary law."

1813. I have quoted rather extensively from the views of *Prof. Ernest Barker* as they appeared to me to have a special significance for explaining the relevant provisions of our Constitution. Indeed, *Prof. Ernest Barker* begins his exposition by citing the Preamble to the Constitution of India; and, he gives this explanation in his preface for such a beginning:

> "I ought to explain, as I end, why the Preamble to the Constitution of India is printed after the table of contents. It seemed to me, when I read it, to state in a brief and pithy form the argument of much of the book, and it may accordingly serve as a key-note. I am the more moved to quote it because I am proud that the people of India should begin their independent life subscribing to the principles of a political tradition which we in the West call Western, but which is now something more than Western."

1814. The "sovereignty of the Constitution", as I see it, is "a feature", as *Bosanquet* put it in his *Theory of the State*, "inherent in a genuine whole". This means that it is not vested in all its aspects in any one of the three organs of the State but may be divided between them. A mark of such sovereignty is certainly the possession of "Constituent Power", although the totality of sovereign power may be divided. *Laski* wrote, in his "*Grammar of Politics*" (pages 296-297):

> "It may yet be fairly argued that, in every State, some distinction between the three powers is essential to the maintenance of freedom. Since the work of Locke and Montesquieu, we have come generally to admit the truth of Madison's remark that 'the accumulation of all powers.. ...in the same hand .....may justly be pronounced the very definition of tyranny."

1815. In order to avoid concentration of such exessive power in few hands that it may corrupt or be misused by those who weild it, our Constitution also divides or distributes legal sovereignty into three branches or organs of the State—the Legislative, the Executive, and the Judicature. The sphere of the sovereignty of each is sought to be so demarcated by our Constitution that the "genuine whole" appears in the form of three intersecting circles. In those portions of these circles where the judicial power intersects the legislative and the executive powers, the judicature acts as the supervisor or guardian of the Constitution and can check legislative or executive action.

But, in the remaining parts of the two intersecting circles of the Legislative and the Executive spheres, the two other branches are supreme legally, just as the judicature is in its own, so that their decisions there cannot be questioned by the judicial branch of the State.

1816. Here we are concerned only with the relationship between judicial and the legislative organs. Our Constitution makes the judicature the ultimate testing authority, as the guardian of the Constitution, in so far as the ordinary law making is concerned. In the sphere of the primary fundamental law of the Constitution lies also the amending power contained in Article 368 of the Constitution over which the control of the judicature is limited to seeing that the form and the manner of the amendment is properly observed. Beyond that, the authority of the judicial organ over the constituent power vested in the constitutional bodies or organs mentioned n Article 368 of the Constitution ceases. No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But, when these authorities act within these limits, it cannot interfere.

1817. After having made a few observations about the nature of the sovereignty of the Constitution and the judicial function connected with it, I will say something about the urge for dynamic changes amply disclosed by the speeches in the Constituent Assembly, which is found embodied in the Preamble as well as the Directive Principles of our Constitution. *Granville Austin* observed in the "*Indian Constitution*: *Cornerstone of a Nation*" (at page 43):

> "What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution, with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired or as its needs demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought, such was the type of Constitution that Constituent Assembly members created."

1818. Thus, the direction towards which the nation was to proceed was indicated but the precise methods by which the goals were to be attained, through socialism or State action, were left to be determined by the State organs of the future. In laying down the principles, by means of which the poverty-stricken, exploited, down trodden, ignorant, religion (*sic*) and superstition ridden masses of India, composed of diverse elements, were to be transformed into a strong, united, prosperous modern nation, it was assumed and said repeatedly that India's economy must change its feudal character. Its social patterns, modes of thought and feeling, were to be changed and guided by scientific thinking and endeavour so as to lead its people on towards higher and higher ranges of achievement in every direction.

1819. Our Constitution-makers, who included some of the most eminent jurists in the country, could not have been ignorant of the teachings of our own ancient jurists, Manu and Parashara, who had pointed out that the laws of each age are different. In support of this view, the late *Dr. Ganga Nath Jha*, in his treatise on *Hindu Law*, has cited two original passages from *Manu* and *Parashara* which run as follows:

(1) *Anve krita yugay dharmaah tretaayam duaaparey parey anye kali yugey nreenaam yuga roopaanusaaratah*

—Parashara
—Manu

(2) *anya krita yugey dharma tretaayaama dvaaparey parey anye kali yugey nreenaam yuga roopaanusaratah*

—Parashara
—Manu

1820. As English translation of the sense of the above passages runs as follows:

> "The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different in the age known as krita from those in the dvaapara age; the fundamental laws of the kali age are different from all previous ages; the laws of each age conform to the distinctive character of that age (*yuga roopa nusaara tah*)".

In other words, even our ancient jurists recognised the principle that one generation has no right to tie down future generations to its own views or laws even on fundamentals. The fundamentals may be different not merely as between one society and another but also as between one generation and another of the same society or nation.

1821. At any rate, I am convinced that we cannot infer from anything in the language of the unamended Article 368 any distinction, beyond that found in the more difficult procedure prescribed for amendment of certain articles, between more and less basic parts of the Constitution. None are sacrosanct and transcendental, in the sense that they are immune from and outside the processes of amendment found in Article 368 and while others only are subject to and within its ambit even before its amendment.

1822. My learned Brother Dwivedi, J., has, very aptly, compared the mode of progress visualized by the Constitution as the movement of the *chakra*. Such a movement naturally involves that a part of the nation which may have been at the top at one time may move towards the bottom and then come back to the top again. The Constitution, however, visualizes the progress of the whole nation towards greater equality as well as prosperity. The function of the amending provision, in such a Constitution, must necessarily be that of an instrument for dynamic and basic changes in the future visualized by our Constitution-makers. The whole Constitution is based on the assumption that it is a means of progress of all the people of India towards certain goals. The course of progress may involve, as choices of lesser of two evils, occasional abrogations or sacrifices of some fundamental rights, to achieve economic emancipation of the masses without which they are unable to enjoy any fundamental rights in any real sense. The movement towards the goals may be so slow as to resemble the movement of a bullock-cart. But, in this age of the automobile and the aeroplane, the movement could be much faster.

1823. The constitutional function with which the judiciary is entrusted, in such a Constitution, is to see that the chosen vehicle does not leave the charted course or path or transgress the limits prescribed by the Constitution at a particular time. The fundamental rights, as I have said earlier, may be viewed as such limits. The power of amendment, in a Constitution such as ours, must include the power to change these limitations to suit the needs of each age and generation. As the celebrated Justice Holmes said in his "*Common Law*", the life of law has not been logic, but the "felt necessities" of the times. Every kind of law, whether fundamental or ordinary, has to be an attempted adaptation to the needs of the people at a particular time. The power of adaptation in a progressive nation, with a Constitution which visualizes a movement towards socialism must, therefore, be construed in the context of the whole setting of urges enshrined in the Constitution and what their satisfaction demands. So construed, it may involve changes in the very features considered basic today.

1824. I think it has been properly poined out by Mr. Niren De, the Attorney-General, and Mr. Seervai, the Advocate-General of Maharashtra, that the proper function of Article 368, in a Constitution is to act as a safety valve against violent revolution. It can only so operate as a safety valve if we do not construe the powers of amendment contained in it so narrowly as to import, contrary to the clear meaning of its explicit language, any bar against the alteration or change of any feature of our Constitution which may be characterised as basic.

1825. We have been taken through a number of principles of interpretation and construction of documents, including a document such as our Constitution, containing the fundamental law of the land. It has been properly pointed out that the amending power, in so elaborate a Constitution, could not possibly omit from its ambit or scope the power of amendment of any part of it so that the 24th Amendment merely clarifies the original intention to lodge a wide amending power within the bosom of Article 368. It has been rightly pointed out that the careful manner in which the Constitution, and, particularly, the amending Article 368 was framed precludes the possibility of a deliberate *casus omisus* so as to exclude from its scope the making of any provision which may either take away or abridge or affect a fundamental right or any other basic feature. In any case, in such a Constitution as ours, we must strongly lean against a construction which may enable us to hold that any part of the Constitution is exempt from the scope of Article 368 as originally framed. Without express words in Article 368 itself to that effect, I am not prepared to merely presume or infer the presence of any *casus omisus* here.

1826. It was no doubt argued, on the strength of the *Golak Nath case* (supra), that direct or indirect abridgment or taking away of a fundamental right by an amendment under Article 368 was expressly barred by the language of Article 13(2) of the Constitution. I am in agreement with the views of my learned brethren who hold that Article 13(2) is meant to deal with ordinary laws or the functions of the Parliament and of State Legislatures in their ordinary law-making capacities. It was not intended to extend its scope indirectly to Article 368 which deals with the amendment of the fundamental law itself of which Article 13(2) is a part. The language and the context as well as the subject-matter of it, found stated in Article 13(2) of the Constitution itself, preclude me from holding that it could possibly operate as a restriction on the powers of amendment of any part of the Constitution contained in Article 368 of the Constitution even before it was amended by the 24th Amendment.

1827. The majority of the learned Judges of this Court in *Golak Nath case* (supra) held that the power of amendment itself andnot merely its procedure was contained in Article 368 of the Constitution. They also held this power of amendment to be wide. Hidayatullah, J., however, thought that the ambit of the term "law", as used in Article 13(2) of the Constitution, was wide enough to cover a change in the fundamental law on which Article 368 exclusively operates. The view of Hidayatullah, J., turned the scales by a narrow majority of one in favour of the opinion that Article 13(2) operates as an express restriction upon the powers contained in Article 368 even though it does not say so expressly. The limitation was inferred from the wide meaning given to the term "law". But, the view of the majority of Judges of this Court who have had the occasion to consider this question, that is, if we include or add the number of those who gave decision in *Sajjan Singh* v. *State of Rajasthan*[84] and *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*,[85] is still in favour of the view that the word "law", as used in Article 13(2) of the Constitution, does not extend to the fundamental law or the Constitution. If it was really the intention to so extend it, at least Article 13(2) would have clarified it.

1828. I am not impressed by the contention that Article 13(2), as originally passed by the Constituent Assembly, contained a specific exemption of the powers of amendment exercised under Article 368 of the Constitution which was dropped afterwards. If the dropping of this clause was intended to bring about so drastic a change in the intention of Constitution-makers as the counsel for the petitioners contends for, there would have been some explanation given by the drafting committee for such a change. Moreover, we have not been shown what authority the drafting committee had to adopt language implying so drastic a change of intention of the Constituent Assembly without even bringing the matter to the notice of the Constituent Assembly. The safer presumption is that the drafting committee dropped the addition proposed by Mr. Santhanam and adopted by the Constituent Assembly merely because it considered the additional words to be otiose and unnecessary.

1829. Our Constitution itself contains in various places a distinction between the Constitution and the law. It mentions both the "Constitution and the law" suggesting that there is a difference between them made by the Constitution itself. See, *e. g.* :

(1) Form of oath of the President prescribed by Article 60 of the Constitution to "preserve protect, and defend the Constitution and the law".

(2) The form of oath or affirmation, prescribed by Article 159 of the Constitution, for the Governor of a State to "protect and defend the Constitution and the law".

(3) The form of oath prescribed by Article 75(4) for a Union Minister given in Schedule III, Form I to "do right to all manner of people in accordance with the Constitution and the law".

(4) The form of oath prescribed for a Judge of the Supreme Court, under Article 124(6) of the Constitution, given in Third Schedule, Form IV to "uphold the Constitution and the laws". The form is the same for the Comptroller and Auditor-General of India under Article 148(2) of the Constitution.

(5) The form of the oath prescribed by Article 164(4) of the Constitution for a Minister of a State Government given in Third Schedule, Form V to "do right to all manner of people in accordance with the Constitution and the law".

(6) The form of oath prescribed by Article 219 of the Constitution for High Court Judge given in Third Schedule Form VIII, to "uphold the Constitution and the laws".

---

[84] (1965) 1 SCR 933 : AIR 1965 SC 845 : (1965) 1 SCJ 377.

[85] 1952 SCR 89 : AIR 1951 SC 458 : 1951 SCJ 775.

1830. Clause (7) of the Fifth Schedule, Part D of the Constitution only explains the meaning of word "amend" as covering an "addition, variation or repeal" and similar is the case with clause (21) of the Sixth Schedule. I am not attracted by the distinction between amendments, which are "deemed" not to be amendments, falling within Article 368, mentioned in the Fifth and Sixth Schedules, and actual amendments covered by Article 368. The word "deemed" was used in these provisions and Articles 4 and 169 merely to indicate that the procedure required by Article 368 was not required here. These provisions certainly furnish an aid in construing and fixing the meaning of the word "amendment" wherever used in the Constitution. And, as I have already held, the scope of amendment must necessarily be wide in the context of the whole Constitution.

1831. It may also be noticed that the term "law", which is not used in Article 368 at all, is sought to be defined in Article 13, sub-article (3) of the Constitution, after stating explicitly "unless the context otherwise requires". I have already dealt with the context of Article 368 containing the power of amendment which necessarily operates on every part of the Constitution so long as its operation on any part is not found expressly excluded.

1832. However, even ignoring the context in which Article 13(3) itself occurs and other foregoing reasons, if we were to assume, for the sake of argument, that, because law is not exhaustively defined by Article 13(3) of the Constitution, the term "law" used there could include the law of the Constitution, another principle of construction could also apply here. This is that even a prior general provision followed by an express provision dealing with a particular type of law could reasonably exclude the particular and special from the purview and scope of the general. It is immaterial if the general provision precedes the provision containing a special law. This could not really affect the basis of the principle applicable.

1833. The principle indicated above has been usually applied between different pieces of legislation or to different Acts. There is no doubt that when the subsequent Act is general and the prior Act is special, the special Act is not repealed by the provisions of the general Act by the application of the maxim: "*Generalia specialibus non derogant*" i.e. the general provisions will not abrogate special provisions (*see* Craies on *Statute Law*, p. 376). Again, "if a special enactment, whether it be in a public or private Act, and a subsequent general Act or absolutely repugnant and inconsistent with one another", it has been said that "the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act". (*See*: Craies on *Statute Law*, p. 380). On the same principle, it has been held that a subsequent particular Act may have the effect of partially repealing the earlier general Act. (See: *Mirfin* v. *Attwood*,[86] *Heston & Isleworth U. D. C.* v. *Grout*;[87] *Harishankar Bagla* v. *M. P. State*.[88]

1834. The above-mentioned principle has been applied generally where the question has arisen whether the particular law prevails over, and, therefore, repeals the general law. It has, however, also been held that the principle may operate to merely curtail the operation of the general law by exempting from its scope the special cases dealt with by the particular law (See *Re Williams*[89], *Mirfin* v. *Attwood* (supra), *Harishanker Bagla* v. *M. P. State* (supra). In other words, the principle may so operate as to curb or reduce the extent or ambit of applicability of the general law. An application of this principle would also show that Constitutional law, as Special Law, may be removed from the purview of "law", as found in Article 13 of the Constitution, even if, by stretching one's imagination, it was really possible to so stretch the scope of the term "law", as used in Article 13 of the Constitution, as would include, but for such a principle, amendments of the Constitution. Prima facie, however, amendments of the Constitution operate on every provision of the Constitution unless any part of it is expressly excluded from the scope of such operation. The use of such a principle to remove an assumed conflict does not appear necessary.

---

[86] 1869 LR 4 QB 330.

[87] (1897)2 Ch 306.

[88] (1955)1 SCR 380: AIR 1954 SC 465: 1954 SCJ 637: 1954 Cr LJ 1322.

[89] (1887)36 Ch D 573 at 577.

1835. Mr. Palkhivala, presumably faced with insurmountable difficulties in relying entirely upon the very narrow majority decision in *Golak Nath's case* (supra), in favour of the view that Article 13(2) operates as a restriction upon the power of amendment contained in Article 368 of the Constitution, relied primarily upon a theory of implied limitations. The only "implied" limitation which I can read into the word amendment, as "perhaps" necessarily implied, or, as part of the meaning of the word "amendment", is the one so characterised by Wanchoo, J., in *Golak Nath's case* (supra). In other words, it may not include the power of completely abrogating the Constitution at one stroke. It, however, seems wide enough to erode the Constitution completely step by step so as to replace it by another.

1836. The Attorney-General himself had, very properly, conceded that the scope of amendment could not be so wide as to create a vacuum by abrogating the rest of the Constitution leaving nothing behind to amend. The Attorney-General's argument was that, short of creating such a vacuum, the power is wide enough to cover a replacement of the present Constitution by another. It seems to me that the necessary implication of the word "amendment" or the meaning of the term itself may exclude a possible complete abrogation of the present Constitution although that could be done, step by step, by the bodies empowered to amend if they so desired and followed the appropriate procedure.

1837. For the reasons already given at length by my brethren Ray, Palekar, Mathew and Dwivedi, with whom I concur, I find that there is nothing in cases cited which could enable us to put in implied limitations, in a Constitution such as ours, on Article 368, containing expressly the sovereign law-making power of amendment of every part of it. The cases have really little bearing on the interpretation of such a provision containing the constituent power. As they were cited before us and examined by us, I will very briefly refer to the main cases cited.

1838. The American cases really go against the submission that implied limitations could be put on expressly stated constitutional powers. They were: *Oscar Leser* v. *J. Mercer Garnett*;[90] *U. S. A.* v. *William H. Sprague & William J. Howey*;[91] *State of Rhode Island* v. *A. Mitchell Palmer, Attorney-General etc.*,[92] *Schneiderman* v. *U. S.*[93]

1839. The cases from Australia decided by the Privy Council were: *McCawley* v. *The King*,[94] *Taylor* v. *Attorney-General of Queensland*,[95] where an interpretation of Section 5 of the Colonial Law Validity Act was given in the light of a presumption that the power transferred to a British Colonial Legislature must be read subject to the fundamental assumption underlying the Constitution of the British Empire that the position of the Crown has not been affected; *Webb* v. *Outrim*,[96] where the theory of implied restrictions on powers found in the Commonwealth Parliament Act was rejected; *Victoria* v. *Commonwealth*,[97] where, without questioning the basic principle of grant of plenary powers of legislation, laid down by Lord Selborne in *Queen* v. *Burah*,[98] a decision was given on the lack of powers in the Federal Legislature, to tax a State, on a subject falling outside Section 51 of the Australian Constitution, which laid down the powers of taxation of the Federal Legislature, in the course of which some observations were made on the implications of Federalism which assumes the continued existence of States.

---

[90] 258 US 130.
[91] 282 US 716.
[92] 253 US 350.
[93] 320 US 118 at 137-145.
[94] 1920 AC 691.
[95] 23 CLR 457.

1840. The cases from Canada may lend some support to the implications of a grant of power contained by an enactment of the sovereign British Parliament, but they do not appear to me to be helpful in the context of the theory of the sovereignty of our Constitution, of which Article 368 is a pivotal part, which we have adopted. The cases from Canada cited before us were: *Alberta Press case*,[99] *Switzman* v. *Elbing & Attorney General of Quebec*,[1] *Saumur* v. *City of Quebec & Attorney-General of Quebec*,[2] *A. G. for the Province of Ontario & Others* v. *A. G. for the Dominion of Canada & Another*,[3] where the assumption, underlying some of the decisions, that Canada did not possess fully blossomed legislative power, seems to have been repelled; *In re the Initiative and Referendum Act*, where legislation offending Section 92 head 1 of the British North America Act, 1867, was held to be invalid.

1841. So far as *Ryan's case*,[4] is concerned, Mr. Palkhivala could only rely on the minority judgment of Kennedy, C. J. In *Moore* v. *Attorney-General for the Irish State*,[5] it was conceded on behalf of a petitioner who had challenged the validity of an Act of the Irish Parliament that the majority decision in *Ryan's case* (supra) was correct. I do not think that the Irish cases give much help to the petitioners' submissions on implied limitation.

1842. Cases coming up from Ceylon also did not assist the petitioners. In the *Bribery Commissioner* v. *Fedrick Ranasinghe*,[6] a provision of the Bribery Amendment Act, 1958, was held to be bad because it conflicted with the provisions of Section 29 of the Ceylon (Constitution) Order in Council, 1946, by which the Constitution of Ceylon was governed. It is, therefore, a simple case of conflict of an enactment of subordinate law-making authority with the instrument of Government which regulated subordinate law-making powers and was, therefore, supreme. In that case the requirements of manner and form as laid down in *Attorney-General for New South Wales & Others* v. *Trethowan & Others*,[7] were also held not to have been complied with. In *Don John Francis Douglas Liyanage & Others* v. *The Queen*,[8] it was held, with regard to the Acts the validity of which was impugned:

> "............ the Act could not be challenged on the ground that they were contrary to the fundamental principles of justice. The Colonial Laws Validity Act, 1865, which provided that colonial laws should be void to the extent that they were repugnant to an Act of the United Kingdom applicable to the colony but not otherwise and should not be

---

[96] 1907 AC 81.
[97] 45 Australian LJ 251.
[98] (1878) 3 AC 889.
[99] (1938) 2 DLR 81.
[1] (1957) 7 DLR 337.
[2] (1953) 4 DLR 461.
[3] 1912 AC 571.
[4] 1935 Irish Reports 170.
[5] 1935 AC 484.
[6] 1965 AC 172.
[7] 1932 AC 526.
[8] (1967) 1 AC 259.

> void on the grounds of repugnancy to the law of England, did not leave in existence a fetter of repugnancy to some vague and unspecified law of natural justice; those liberalising provisions were incorporated in, and enlarged by, the Ceylon Independence Act, 1947, of the British Parliament, the joint effect of which, with the Ceylon (Constitution) Order in Council, 1946, was to confer on the Ceylon Parliament the full legislative powers of a sovereign independent State."

This case shows that repugnancy to some vague principle of "natural justice" could not invalidate the enactments of a fully competent legislative authority.

1843. There can be no question of delegation of the power of amendment if, as I have already indicated, I hold that the Constitution is the principal and the source of all constitutionally valid power and authority in the eye of law. The principle *Delegatus non potest delegare* is only applicable against a delegate but not against the principal. When an amendment is made by an appropriate procedure, the amendment becomes a part of the principal's own will and intention and action. Of course, if the principal is and must necessarily be a human authority, the bodies of persons authorised to amend under Article 368 of the Constitution would share the legislative sovereignty and would constitute the "Principal" whose will is expressed in the amendment.

1844. It may be possible to use the test of consequences in order to check an abuse of power by a legally non-sovereign law-making body as the Parliament is when it does not exercise the constituent power by the use of the two-third's majorities in both Houses of Parliament as required by Article 368 of the Constitution. It may also be possible to use the theory of implied limitation by implying and annexing rules of natural justice to particular kinds of non-legislative functions laid down by statutory or even constitutional law. But, this is done only by presuming that the Constitution did not intend abrogation of the fundamental rules of natural justice. If these rules are sought to be dispensed with by any particular ordinary enactment it may be possible to assail the validity of that enactment when Articles 14 and 19 of the Constitution apply. The exclusion of Articles 14 and 19 by a constitutionally valid amendment only carves out or creates a new legislative field by a provision which becomes a part of the Constitution by amendment, so that the constitutional validity of its creation cannot be assailed in any court of law so long as the form and manner prescribed by Article 368 of the Constitution have been observed in making the necessary amendment. Enactments properly falling within this field would be immune from attack for any alleged violations of Articles 14, 19, and 31.

1845. Mr. Palkhivala then made an impassioned appeal to the theories of natural law and natural rights sought to be embodied in present day international laws as well as constitutional laws. It is not necessary for me to deal at length with the political philosophy or the juristic implications of various and conflicting natural law theories, such as those of *Spinoza*, *Hobbes*, *Locke or Rousseau*, discussed by T. H. Green in his "*Principles of Political Obligation*". I also do not find it necessary to embark on an academic discussion of ancient and medieval theories of natural law.[4] I will, however, quote a passage from *Friedmann* on *Legal Theory* (5th Edition, pp. 95-96), where the position, place, and uses of "natural law" theories are thus summarised:

> "The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the

last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it."

"Natural law has fulfilled many functions. It has been the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system; it has been a weapon used by both sides in the fight between the medieval Church and the German emperors; in its name the validity of international law has been asserted, and the appeal for freedom of the individual against absolutism launched. Again it was by appeal to principles of natural law that American judges, professing to interpret the Constitution, resisted the attempt of State legislation to modify and restrict the unfettered economic freedom of the individual."

"It would be simple to dismiss the whole idea of natural law as a hypocritical disguise for concrete political aspirations and no doubt it has sometimes exercised little more than this function. But there is infinitely more in it. Natural law has been the chief though not the only way to formulate ideals and aspirations of various peoples and generations with reference to the principal moving forces of the time. When the social structure itself becomes rigid and absolute, as at the time of Schoolmen, the ideal too will take a static and absolute content. At other times, as with most modern natural law theories, natural law ideals become relative or merely formal, expressing little more than the yearning of a generation which is dissatisfied with itself and the world, which seeks something higher, but is conscious of the relativity of values. It is as easy to deride natural law as it is to deride the futility of mankind's social and political life in general, in its unceasing but hitherto vain search for a way out of the injustice and imperfection for which Western civilisation has found no other solution but to move from one extreme to another."

"The appeal to some absolute ideal finds a response in men, particularly at a time of disillusionment, and doubt, and in the times of simmering revolt. Therefore natural law theories, far from being theoretical speculations, have often heralded powerful political and legal developments."

1846. I am not prepared to use any natural law theory for putting a construction on Article 368 of the Constitution which will defeat its plain meaning as well as the objects of the Constitution as stated in the Preamble and the Directive Principles of State Policy. I do not know of any case in which this has been done. Even in the *Golak Nath's case* (supra), Subba Rao, C. J., relied on a natural law theory to strengthen his views really based on an application of the supposed express bar contained in Article 13(2).

1847. I have already stated my point of view, that we should approach the questions placed before us from the pragmatic angle of the changing needs of social and economic orders visualised by those who were or are the final Judges of these needs in exercise of the Constituent power. Checks on possible abuses of such powers do not lie through actions in Courts of law.

The pressure of public opinion, and the fear of revolt due to misuse of such powers of amendment are the only practically possible checks which can operate if and when such contingencies arise. These checks lie only in the political fields of operation. They are not subject to judicial review or control. In other words, what *Dicey* calls the external and the internal limits may operate to control and check possible misuses of such power. Courts of justice have no means of control over a power expressly sanctioned by the Constitution which is the legal sovereign. They can only speak for the Constitution. Through their pronouncements must be heard the voice of the Constitution and of nothing beyond it.

1848. Although the Courts must recognise the validity of the exercise of a legally sovereign constituent power, such power may itself be ineffective for actually bringing about the desired results. Whether the change is in the direction of what may be considered better may itself be a matter of dispute. The answers to such questions and disputes depend upon many conditions which are outside the control of law courts. The very existence or absence of such conditions cannot be appropriately investigated or determined in law Courts. Therefore, such investigations lie outside the judicial domain when once a change is brought in by the exercise of constituent or sovereign law-making power in accordance with the prescribed procedure.

1849. A socialistic State must have the power and make the attempt to build a new social and economic order free from exploitation, misery and poverty, in the manner those in charge of framing policies and making appropriate laws think best for serving the public good. We do not today conceive of public good or progress in terms of a "movement from status to contract", but in terms of a movement for control of economic and other kinds of powers of exploitation by individuals so as to ensure that public good not merely appears to be served but is actually served by all individuals wherever or however placed. The emphasis today is upon due performance of their social obligations by individuals before claiming any right however fundamental or important it may be because rights and duties are correlative.

1850. Another contention advanced was that a creature of the Constitution could not possibly possess the power to create or recreate the Constitution. Therefore, it was contended, resort could not be had to Article 368 to expand the power of amendment. I am unable to accept this contention in the face of the express provision in clause (*e*) to the proviso to the Article 368(2) of the Constitution. There, Article 368 expressly provided either for the expansion or diminution of the scope of the powers of amendment. It cannot, therefore, be reasonably contended that the power of recreation even of the whole Constitution by stages was not already contained in the unamended Article 368. This part of the proviso also shows that the Constitution-makers contemplated a wide amending power so as to meet the challenges of the times offered by rapidly changing social, political, economic, national, and international conditions and situations. We cannot contract what the Constitution-makers clearly intended to make elastic and expansible.

1851. For the foregoing reasons, I hold that the 24th Amendment of the Constitution is valid. It would, therefore, follow that the 25th and 29th Amendments are also valid. The reasons for the validity of each of these amendments have been so fully dealt by my learned brethren Ray, Palekar, Mathew, and Dwivedi with most of which I respectfully concur, that I need not discuss or repeat any of them here. Nor have I, for this very reason, attempted to discuss the enormous array of cases, both Indian and foreign, or the great many juristic writings, placed before and closely examined by us. I will, however, indicate before I conclude, my special reasons for holding Section 3 of the Constitution (25th Amendment) Act, 1971, adding Article 31-C to the Constitution also as valid.

1852. Article 31-C has two parts. The first part is directed at removing laws passed for giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 of the Constitution from the vice of invalidity on the ground that any such law "is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 of the Constitution". If we stop here, the question whether the law is really for the purpose of giving effect to the principles specified in clauses (*b*) or (*c*) of Article 39 would still be justiciable wherever laws passed under this provision come up before Courts. In other words, the question of relevancy of the law passed to the specified principles could still be examined by Courts although the effect of invalidity for alleged violations of Article 14, 19 or 31 would vanish so long as the law was really meant to give effect to the principles of Article 39 (*b*) and (*c*). In other words, a colourable piece of legislation with a different object altogether but merely dressed up as a law intended for giving effect to the specified principles would fail to pass the test laid down by the first part. The second part of Article 31-C goes on to provide that, if such a law contains a declaration that it is for giving effect to such policy, it will become immune from judicial review altogether. In cases of laws passed by State Legislatures there is a further safeguard that such laws must have been reserved for consideration by the President and assented to by him. The purpose of the declaration is, therefore, to take the place of a judicial verdict on relevancy of the grounds to the principles found in clauses (*b*) and (*c*) of Article 39 as well as on effectiveness of these laws for the intended purposes. Nevertheless, the Attorney-General and the Solicitor-General, appearing for the Union of India, conceded, both in written submissions and in the course of arguments, that the question of relevancy or nexus with the specified principles would be open to judicial scrutiny in such cases of declarations annexed to laws passed.

1853. My learned brother Khanna has been pleased, despite the concession mentioned above, to declare the second part of Article 31-C to be void on the ground, among others, that it involves a trespass on the judicial field. It was said that, under the guise of exercise of the power of amendment, one of the pillars of the Constitution or one of the essential features of its basic structure, that is to say, judicial review, had been removed.

1854. I think that the concession made on behalf of the Union of India is quite justifiable on a ground which I now proceed to adopt. It is that a declaration by itself is not part of the law made, but it is something only attached to the law even though, this annexation is by a purported law. In other words, the declaration, though provided for by law, takes the place of judicial consideration by the Courts and involves consideration of the question whether it is reasonable and necessary to attach such a declaration to a particular law.

1855. I do not think that it is necessary for me to decide what the exact nature of the function in giving the declaration is or whether it carries with it, by implication, the proposition that some rules of natural justice must be complied with. Such questions were not argued before us by any party. Nevertheless, I think that the concession could only be made on the strength of the view that the declaration by itself would not preclude a judicial examination of the nexus so that Courts can still determine whether the law passed is really one covered by the field carved out by Article 31-C or merely pretends to be so protected by parading under cover of the declaration. I, therefore, adopt this reason as perfectly good one for making the concession. Hence, I hold that both parts of Article 31-C are valid.

1856. On questions relating to the Amendment of Article 31(2) and the 29th Amendment of the Constitution, I adopt the reasons of my learned brethren, Ray, Mathew and Dwivedi, with whose conclusions I concur on these and other questions.

1857. My conclusions may now be stated as follows:

(1) The majority view in *Golak Nath's case* (supra) holding that Article 13 operated as a limitation upon the powers of constitutional amendment found in Article 368, was erroneous. The minority view there was correct on this question.

(2) The 24th Amendment is valid.

(3) The 25th Amendment, including addition of Article 31-C, is valid.

(4) The word 'amount' in Article 31(2), as amended, does not convey the idea of any prescribed norm. The fixation of the amount or the laying down of a principle for determining the amount are matters within the exclusive power of Parliament or the State Legislature concerned. In other words, the norms and their satisfaction on the question of adequecy of compensation or its reasonableness, are matters within the exclusive competence of the legislative authorities to determine.

(5) The declaration contemplated by Article 31-C is like a certificate given after considering the relevancy of the principles specified in Article 39(*b*) and (*c*) of the Constitution, and, therefore, the jurisdiction of the Court is not ousted. The Courts can still consider and decide whether the declaration is really good or a mere pretence attached to a colourable piece of legislation or to a law which has no bearing on or nexus with the principles found in Article 39 (*b*) and (*c*) of the Constitution. Out of two equally acceptable views, even on the question of nexus, the one in conformity with the legislative verdict should prevail.

(6) The 29th Amendment is valid.

1858. I would also have the petitions disposed of in the light of decisions given above. I make no order as to costs incurred by parties for this stage of hearing.

Dwivedi, J.—I concur with the conclusions reached by brother Ray with respect to the constitutionality of the 24th, 25th and 29th Amendments. But in view of the importance of the case I wish to add my own reasons in support of those conclusions.

1859-A. Ideas which failed to win the minds of Englishmen in the Stuart period and died in discomfiture are seeking transmigration into the Constitution of India now. Perceive some resemblances.

	Ideas during the Stuart Period		*Arguments of Sri Palkhivala*
1.	"Acts of Parliament may take away flowers and ornaments of the Crown, but not the crown itself…………"[9]	1.	By virtue of Article 368 Parliament cannot so amend the Constitution as to take away or abridge the essential features of the Constitution.
2.	"The Parliament cannot deliver over the free people of England to a foreign government, or to laws imposed by foreigners…"[10]	2.	Parliament cannot so amend the Constitution as to make the Republic of India a satellite of a foreign country.
3.	"The Parliament cannot deprive the free people of England of their innate rights of electing knights, citizens and burgesses for Parliament. In these things of the nature of these tending to the Fundamental rights and laws of the people the Parliament cannot nor ought not any way to violate the people or nation."[11]	3.	Parliament cannot so amend the Constitution as to damage or destroy the core of the fundamental rights in Part III of the Constitution.
4.	"Properties are the foundation of Constitution, and not the Constitutions of property. Or if so be there were no Constitution, yet Law of Nature does give a principle for every man to have a property of what he has or may have which is not another man's."[12]	4.	The right to property is a human right and is necessary for the enjoyment of every other right. It is based on Natural Law. It cannot be taken away or abridged by an amendment of the Constitution.
5	"How any representative, that has not only a mere trust to preserve fundamental, but that is a representative that makes laws, by virtue of this fundamental law, viz. that the people have a power in legislation………… can have a right to remove or destroy that fundamental? The fundamental makes the people free: this free people makes a representative; can this creature unqualify the creator?"[13]	5.	Parliament is a creature of the Constitution. It cannot rise above its creator i. e., the Constitution. So it cannot damage or destroy the core of the Fundamental rights.

---

[9] Sir John Finch, C.J., *Fundamental Law in English Constitutional History* by J.W. Gough, 1955 Edn. p. 75.

[10] *William Ball of Barkham Esquire,* Ibid, p. 107.

[11] *William Ball of Barkham Esquire,* Gough (Ibid), p. 107.

[12] *Captains Clarke* Gough, supra, p. 115.

[13] *Quaker William Penn,* Ibid, p. 155.

6. "When an act of Parliament is against common right or person, the Common Law will control it and adjudge such act to be void."[14]	6. Amending power in Article 368 is limited by the principles of Natural Law and an amendment in violation of these principles will be void.
7. "Cases which concern the life, or inheritance, or goods or fortunes of subjects.........are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it."[15]	7. The inherent and implied limitations to the amending power in Article 368 will be determined by judges possessing a trained and perceptive judicial mind.

1860. Of these three contenders for primacy in the Stuart period—King, Parliament, Common Law—Parliament came out victorious.[16] The King and the Common Law accepted its supremacy. Stuart England was passing through an age of transition. So is India today. "We are passing through the great age of transition..........When we are passing through the great age of transition, the various systems—*even systems of law—have to undergo changes. Conceptions which had appeared to us basic undergo changes*".[17] (Emphasis added). At bottom the controversy in these cases is as to whether the meaning of the Constitution consists in its being or in its becoming. The Court is called upon to decide whether it is a prison-house or a freeland, whether it speaks for the few or for the many. These issues can hardly be resolved with the aid of foreign legal know-how. Decisions of foreign courts and treatises and articles written on various constitutions by foreign writers would not be safe guides in construing our Constitution. "(I)n the last analysis the decision must depend upon the words of the Constitution . . ..and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are same in both cases, for a word or phrase may take a colour from its context and bear different senses accordingly". (*In re C. P. & Berar Sales of Motor Spirit Lubricants Taxation Act, 1938*.[18] For instance, law-making and Constitution-amending are both called 'law' in Canada and Ceylon because a constitutional amendment there is really a subordinate enactment passed under a statute of the British Parliament or under an Order-in-Council which is delegated legislation. Our Constitution "is something fresh and in that sense unique..........It seems to me therefore that it is useless to try and look at this through the eyes of another country or of their courts". *In re The Delhi Laws Act, 1912*.[19]

1861. "A Constitution is the expression in national life of the genius of a people. It reflects the tendencies of the age and the articles have to be interpreted, without doing violence to the language, in the light of the prevailing phase of sentiments in the country in which the Constitution is intended to operate". *Motilal* v. *State of U. P.*[20] Constitutions which grew up in the 17th, 18th and 19th centuries reflected the hopes and aspirations of men of those times; the Constitution of India reflects the hopes and aspirations of the people of India emerging from colonial economy in the second half of the 20th century. Constitutions framed in the past for organising political democracy cannot serve as a safe guide in construing the Constitution of India framed for ushering in social and economic democracy.

---

[14] Coke in *Dr. Bonhen's case*, quoted in the *Revival of Natural Law Concepts* by C.G. Heines, 1930 Edn. pp. 33-34.

[15] Coke as quoted in the *English Constitutional Conflicts of the Seventeenth Century, 1603-1689* by J. R. Tanner, 1961 Student Edn. p. 37.

[16] F.W. Maitland: *Constitutional History of England*, (Paper back reprint 1963) pp. 300-301.

[17] Jawaharlal Nehru: *CAD*, Vol. 9, p. 1194.

[18] 1939 FCR 18 at p. 38 per Gwyer, C.J.: AIR 1939 FC 1.

[19] AIR 1951 SC 332: 1951 SCJ 527: 1951 SCR 747 at p. 1112 per Bose, J.

1862. Constitutions which grew up in the preceding three centuries were understood to sanctify the Supremacy of Property, said Tocqueville: "The French Revolution has allowed one exclusive right to remain, the right of property, and the main problems of politics will deal with the alterations to be brought about in the right of property-holders".[21] Our Constitution is conceived in a radically different tradition. Our forbears did not believe in the acquisition of things of pleasure (*Preya*); they stood for the good and the wholesome (*Shrey*). They addressed their king as Rajan because it was his duty to secure the welfare of his people.[22] Their rule of law (*Dharma*) was intended to help the power minus keep the power plus in check. Their rule of law (*rita*) was a stream, not a puddle. It recognised the inevitability of change. They believed in the moral precept: distribute and enjoy the residue of wealth.[23]

1863. The Constitution bears the imprint of the philosophy of our National Movement for Swaraj. That philosophy was shaped by two pre-eminent leaders of the Movement—Mahatama Gandhi and Jawaharlal Nehru. Mahatama Gandhi gave to the Movement the philosophy of Ahimsa. Two essential elements of his Ahimsa are: (1) equality; and (2) absence of the desire of self-acquisition (*Aparigrah*). He declared that "to live above the means befitting a poor country is to live on stolen food".[24] And he also said: "I consider it a sin and injustice to use machinery for the purpose of concentration of power and riches in the hands of the few. Today the machinery is used in this way".[25]

1864. While Mahatama Gandhi laid stress on the ethics of the Movement. Jawaharlal Nehru enriched its economic content. In his presidential address to the Lahore Congress Session of 1929 he said:

> "The philosophy of socialism has gradually permeated the entire structure of the society the world over and almost the only point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end her poverty and inequality though she may evolve her own methods and may adopt the ideal to the genius of her race".[26]

Emphasising the intimate and inseverable connection between national liberation and social liberation, he said: "(I) f an indigenous Government took place of the foreign government and kept all the vested interests in fact, this would not be even the shadow of freedom .... India's immediate goal can only be considered in terms of the ending of the exploitation of her people.

---

[20] ILR (1951) 1 All 269: AIR 1951 All 257 at p. 297 per Sapru, J.

[21] As quoted in *French Political Thought in the 19th Century* by Roger Henry Soltau, p. 55.

[22] Mahabharata, Shanti Parva, 57:11.

[23] Mahabharata, Shanti Parva, 60:11.

[24] Dr. P. Sitaramaya, *The History of the Indian Congress*, Vol. I, p. 386.

[25] Jawaharlal Nehru: *Discovery of India*, Signet Press, 1956, p. 432.

[26] R.D. Agarwala; *Economic Aspect of a Welfare State in India*, p. 32.

Politically it must mean independence and cessation of the British connection; economically and socially it must mean the ending of all special class privileges and vested interests."[27]

1865. The philosophy of Mahatama Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere political equality; the humanism of Mahatama Gandhi and Jawaharlal Nehru was instinct with social and economic equality. The former made man a political citizen; the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj.

1866. In 1929 the All India Congress Committee resolved that the great poverty and misery of the Indian people was due also "to the economic structure of the society".[28] The Karachi Congress resolution on fundamental rights and economic programme revised in the All India Congress Session of Bombay in 1931 declared that in order to end the exploitation of the masses political freedom must include economic freedom of the starving millions.[29] It provided that "property was not to be sequestered or confiscated "*save in accordance with law*".[30] (emphasis added). It also provided that the State shall own or control the key industries and services, mining resources, railways, waterways, shipping and other means of public transport".[31] According to the Congress Election manifesto of 1945, "the most vital and urgent of India's problems is how to remove the curse of poverty and raise the standard of masses.[32] It declared that for that purpose it was "necessary... ......to prevent the concentration of wealth and power in the hands of individuals and groups, and to prevent vested interests inimical to society from growing".[33] It proposed acquisition of the land of intermediaries on payment of equitable compensation.[34] In November 1947 the All India Congress Committee Session at Delhi passed a resolution to the effect that the object of the Congress should be to secure "an economic structure which would yield maximum production without the creation of private monopolies and the concentration of wealth".[35] It was thought that such "social structure can provide an alternative to the acquisition of economic and political equality".[36]

1867. In sum, the National Movement was committed: (1) to work for social, economic and political equality of the weaker sections of the people; (2) to disperse concentration of wealth in any form in a few hands; and (3) to acquire property in accordance with law. Payment of compensation would be determined by equitable considerations and not by market value. The men who took the leading part in framing the Constitution were animated by these noble ideals. They embodied them in the Preamble to the Constitution; they proliferated them in the Directive Principles of the State Policy; they gave them ascendancy over the rights in Part III of the Constitution. [See Articles 15(3), 16(4), 17, 19(2) to (6), 24, 25(*a*) and (*b*), 31(4), (5) and (6)]. They made them 'fundamental' in the governance of the country. Pandit Govind Ballabh Pant called them 'vital principles'.[37] And indeed so they are, for when translated into life, they will multiply the number of owners of fundamental rights and transform liberty and equality from a privilege into a universal human right.

---

[27] Jawaharlal Nehru: *Whither India*, 1933.

[28] *Indian National Congress*: *Resolutions on Economic Policy, Programme and Allied Matters*, 1924-1969, p. 3.

[29] *Resolutions*, supra, pp. 6-9.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid*; p. 14.

[33] *Ibid*; p. 14.

[34] *Ibid*; pp. 15-16.

[35] *Ibid*; pp. 18-19.

[36] *Ibid*; pp. 18-19.

1868. However, pleasing its name-plate or its trumpet, every form of focussed power was suspect in the eyes of the Constitution-makers. They apprehended that concentration of the ownership of the means of production and material resources and the resultant incarceration of wealth in a few profit-seeking hands may bring into being an economic power as all-assimilating and omnicompetent as the Hegelian State. It may manipulate a fall in the prices of raw-materials; it may inflate the prices of manufactures by low production and hoarding; it may increase unemployment and bring down wages; it may shrink investments and control the industrial progress of the nation.[38] It may seek to influence politics and public opinion.[39] It may try to threaten, restrain and change governments in self-interest.[40] It may endanger liberty, the rule of law and peace.[41] It may retard national unity, the growth of culture and education.[42] To prevent these manifold abuses of the economic power the Constitution-makers enacted Article 39(*b*) and (*c*). It will be legitimate to bear in mind the pre-emptive significance of Part IV in understanding the Constitution.

1869. It is now necessary to consider whether the majority decision in *Golaknath case*[43] is correct.

Residence of Amending Power

1870. In *Golaknath case* (supra) Wanchoo, J., and two other Judges who associated with him and Hidayatullah, Bachawat and Ramaswami, JJ., took the view that the power to amend the Constitution is located in Article 368. Subba Rao, C. J., and four other learned Judges who associated with him, on the contrary, held that Article 368 does not grant the power of amending the Constitution. It merely provides for the procedure for amendment of the Constitution. I respectfully agree with the view that the amending power resides in the original Article 368.

1871. Despite the marginal note to Article 368, which indicates that Article 368 is prescribing the procedure for amendment, several considerations clearly show that the amending power is located in Article 368. Article 368 provides specifically for a procedure for amending the Constitution. When the prescribed procedure is strictly followed, "the Constitution shall stand amended in accordance with the terms of the Bill". Parliament can bring about this result by strictly following the prescribed procedure. One who can bring about a certain result may truly be said to have the power to produce that result. Power to amend the Constitution is accordingly necessarily implied in Article 368.

---

[37] *CAD*, Vol. 9, p. 1288.

[38] J.K. Gailbraith; *American Capitalism*, pp. 21, 40 and 64; *Report of the Monopolies Inquiry Commission*, (*1965*), Vol. 1, pp. 125, 128, 132 and 134.

[39] J. K. Gailbraith, *Ibid*, p. 123; Bertrand Russel: *Power* (*Unwin Books*), p. 85; *Monopolies Inquiry Commission Report*, p. 136.

[40] B. Russel, *Ibid*, pp. 86, 88 and 124: *Monopolies Inquiry Commission Report*, pp. 1, 135 and 193.

[41] J.K. Gaibraith, *Ibid*, pp. 67 and 70; W. Friedmann. *An Introduction to World Politics*: (*London Macmillan and Co., Ltd.*, 1962, p. 4.

[42] *Monopolies Inquiry Commission Report*, p. 136.

[43] (1967)2 SCR 762: AIR 1967 SC 1643: (1967) 2 SCJ 486.

1872. Article 368 finds place in Part XX of the Constitution. It is the solitary Article in that part. If provision was being made in Article 368 merely for procedure for amending the Constitution by Parliament, the Constitution-makers would have placed it logically under the heading "Legislative procedure" in Part V of the Constitution. Including the solitary Article 368 in a separate part suggests that it was intended to confer the amending power as well as to provide for the amending procedure. The heading of Part XX is "amendment of the Constitution" and not "procedure for amendment of the Constitution". The heading will include both power as well as procedure. The proviso to Article 368 also shows that the amending power is lodged therein.

1873. Power to amend the Constitution cannot reasonably be located in Entry 97 of List I of Schedule VII read with Article 248 of the Constitution. The idea of a provision for amending the Constitution was indisputably present in the minds of the Constitution-makers. If they had considered that the power to amend the Constitution was in its nature legislative, they would have surely included in express words this power in a specific entry in List I. Article 248 and Entry 97 of List I confer residuary power on Parliament. Article 246 and List I confer certain specific powers on Parliament. Residuary power is intended to comprehend matters which could not be foreseen by the Constitution-makers at the time of the framing of the Constitution. As the topic of amending the Constitution was foreseen by them, it could not have been put in the residuary power. Article 245(1) confers power on Parliament "subject to the provisions of this Constitution". Articles 246 and 248 are subject to Article 245. Accordingly, a law made under Article 248 and Entry 97 of List I cannot be inconsistent with any provision of the Constitution. But a law made under Entry 97 for amending any provision of the Constitution would be inconsistent with that provision. Accordingly it would be invalid. But on following the prescribed procedure in Article 368 there ensues a valid amendment of the Constitution. So Article 248 and Entry 97 cannot include the power to amend the Constitution. The history of residuary power in our country also indicates that the power to amend the Constitution cannot be subsumed in the residuary power. Section 104 of the Government of India Act, 1935 provided for residuary power. The Governor-General could by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in Schedule VII. Acting under Section 104, the Governor-General could not empower either Legislature to make a law for amending the Government of India Act. The power to amend the said Act vested exclusively in the British Parliament. While the Constitution was on the anvil, residuary power was proposed to be vested in the States. If that power had been vested in the States, it could not have been possible to argue that the Constitution could be amended by resort to residuary power because the amending bill is to be initiated in Parliament and not in the States. It was only at a later stage that the residuary power was included in List I. The foregoing considerations show that the amending power does not reside in Article 248 and Entry 97 of List I. As already stated, it is located in Article 368 of the Constitution. Article 304(1) of the Draft Constitution was similar to Article 368. Article 304(2) enabled States to amend the Constitution as regards the method of choosing a Governor or the number of Houses of the State Legislature. In Clause 18 of his letter, dated February 21, 1948, to the President of the Constituent Assembly, Dr. B. R. Ambedkar, while forwarding the Draft Constitution, said that a provision giving 'a limited constituent power' to the State Legislature has been inserted in Article 304.

1874. The procedure prescribed in *Article 368 is* the exclusive procedure for amendment of the Constitution. The word 'only' in Article 368 rules out all other procedures for amendment. So no law can be made for a *referendum or a constituent assembly.* A referendum or a constituent assembly will reduce Article 368 to redundance. Referendum was not accepted by the framers of the Constitution. Dr. B. R. Ambedkar said: "The Draft Constitution has eliminated the elaborate and difficult procedure such as a decision by a convention or a referendum. The powers of amendment are left with the Legislatures, Central and Provincial".[44]

Nature of Amending Power

1875. With respect I find it difficult to share the view of Hidayatullah, J., that the amending power in Article 368 is a 'legislative power'. [*Golaknath case* (supra) at page 900].

1876. During the British period neither the people of this country nor their elected representatives were endowed with the power to make or amend their Constitution Act. The Constitution Act by which they were governed until August 14, 1947 was enacted by the British Parliament. The power to amend that Act was vested in that Parliament. The elected representatives of the people could until that date make only legislative laws under the Constitution Act. The Constitution Act endowed them with a legislative power. Under Sections 99 and 100 of the Government of India Act, 1935, the Union and Provincial Legislatures made legislative laws. Under Sections 42, 43 and 44 and Section 72 of Schedule IX the Governor-General made ordinances. The Governor made ordinances and Acts under Sections 88, 89 and 90. The headings of all those provisions describe the law-making power as 'legislative power'. The framers of the Constitution were familiar with the historical meaning of the expression 'legislative power' in this country. They were also aware of the meaning of 'constituent power'. Accordingly, it is reasonable to believe that they have made a distinction between 'legislative power' and 'constituent power'. Indeed they have described the power of making legislative laws as a 'legislative power'. The heading of Part XI is 'Distribution of Legislative Powers'; the heading of Article 123 is 'legislative power of the President'; the heading of Article 213 is 'legislative power of the Governor'. It may be observed that the framers did not include Article 368 under the heading 'legislative power' or in Part XI or in the company of the provisions dealing with the legislative procedure in Part V of the Constitution. They placed it in a separate part. This omission is explained by the fact that they were making a distinction between 'legislative power' and 'constituent power'.

1877. Broadly speaking, 'constituent power' determines the frame of primary organs of Government and establishes authoritative standards for their behaviour. In its ordinary sense, legislative power means power to make laws in accordance with those authoritative standards. Legislative power may determine the form of secondary organs of Government and establish subordinate standards for social behaviour. The subordinate standards are derived from the authoritative standards established by the constituent power. Discussing the concept of 'legislative power', Bose, J., said: "We have to try and discover from the Constitution itself what the concept of legislative power looked like in the eyes of the Constituent Assembly which conferred it. When that body created an Indian Parliament for the first time and endowed it with life, what did they think they were doing? What concept of legislative power had they in mind? ....First and foremost, they had the British model in view where Parliament is supreme in the sense that it can do what it pleases and no Court of law can sit in judgment over its Acts. That model it rejected by introducing a federation and dividing the ambit of legislative authority. It rejected by drawing a distinction between the exercise of constituent powers and ordinary legislative activity........" [*In re The Delhi Laws Act, 1912* (supra) at page 1112].

---

[44] *CAD*, Vol. 7, p. 43.

1878. Parliament's additional power to amend certain provisions of the Constitution by ordinary law would not obliterate the distinction between constituent power and legislative power. Constitutions may be uncontrolled like the British Constitution, or controlled like the Constitution of the United States of America. There may be a hybrid class of Constitutions, partly controlled and partly uncontrolled. In an uncontrolled Constitution the distinction between constituent power and legislative power disappears, because the legislature can amend by the law-making procedure any part of the Constitution as if it were a statute. In a controlled Constitution the procedure for making laws and for amending the Constitution are distinct and discrete. No part of the Constitution can be amended by the law-making procedure. This distinction between constituent power and legislative power in a controlled Constitution proceeds from the distinction between the law-making procedure and the Constitution-amending procedure. Our Constitution is of a hybrid pattern. It is partly controlled and partly uncontrolled. It is uncontrolled with respect to those provisions of the Constitution which may be amended by an ordinary law through the legislative procedure; it is controlled with respect to the remaining provisions which may be amended only by following the procedure prescribed in Article 368. When any part of the Constitution is amended by following the legislative procedure, the amendment is the result of the exercise of the legislative power; when it is amended through the procedure prescribed by Article 368, the amendment is the result of the exercise of the constituent power. The amending power conferred by Article 368 is a constituent power and not a legislative power.

Dominion of Amending Power

1879. The phrase "amendment of this Constitution" is the nerve-centre of Article 368. It is determinative of the dominion as well as the magnitude of the amending power. The words "this Constitution" in the phrase embrace the entire Constitution, as according to Article 393, "this Constitution" is called "the Constitution of India". These words are also used in Articles 133(2) and 367(1), (2) and (3). In those provisions these words would envelop each and every provision of the Constitution. They should convey the same meaning in Article 368. Accordingly each and every provision of the Constitution including Part III falls within the sway of the amending power.

1880. *In re Berubari Union and Exchange of Enclaves*[45] it is said that "the Preamble is not a part of the Constitution". This remark cannot assist the argument that the Preamble is not liable to amendment. It seems to me that the Court really intended to say that the Preamble is not an enacting part of the Constitution. On October 17, 1949 the Constituent Assembly passed a resolution to the effect that "the Preamble stands part of the Constitution".[46]

1881. According to Article 394 that Article and Articles 5 to 9, Articles 60, 324, 366, 367, 379, 380, 388 and 391 to 393 came into force on

---

[45] (1960) 3 SCR 250 at p. 282: AIR 1960 SC 845: 1960 SCJ 933.

[46] *CAD*, Vol. X, p. 456.

November 26, 1949, while "the remaining provisions of this Constitution" were to come into force on January 26, 1950. It is clear from the phrase "the remaining provisions of this Constitution" that the Preamble also came into force on January 26, 1950. Replying to Sri K. Santhanam's question in regard to the date of the coming into force of the Preamble, Shri Alladi Krishnaswami Ayyar said: "The Preamble will come into force in all its plentitude when the Constitution comes into force".[47]

1882. A statute has four parts—title, preamble, enacting clause and purview or body.[48] The Preamble to the Constitution of the United States of America is regarded as a part of the Constitution.[49] The heading "the Constitution of India" above the Preamble shows that the Preamble is a part of it.

1883. As the Preamble is a part of the Constitution, it is liable to amendment under Article 368. Those parts of the Preamble which operate on the past such as "this 26th day of November, 1949" may perhaps not be capable of modification. 'Even Jove hath not power on the past'. But there is little doubt that such parts can be deleted by the exertion of the amending power.

1884. In sum, no provision of the Constitution can claim immunity from the sway of the amending power. The amending power can amend each and every provision of the Constitution including the Preamble and Part III.

Magnitude of Amending Power

1885. The magnitude of Amending power is measurable by the broad-shouldered word "amendment" in Article 368. According to Wanchoo, J., the word "amendment" should be given its full meaning as used in law and that means that by amendment an existing Constitution........can be changed, and this change can take the form either of addition to the existing provisions or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether". [*Golaknath case*, (supra) at page 834]. Hidayatullah, J. said: "I do not take a narrow view of the word "amendment" as including only minor changes within the general frame-work. By amendment new matter may be added, old matter removed or altered". (*Ibid*, page 862). Bachawat and Ramaswami, JJ., gave the same extensive meaning to the word "amendment". Thus according to six out of eleven Judges in *Golaknath case*, (supra) the word "amendment" means amending by addition, alteration or repeal. According to the *Shorter Oxford English Dictionary* "amendment" means: "removal of faults of errors; reformation esp. (law) in a writ or process 1607". According to *Webster's Third New International Dictionary*, it means "Act of amending esp. for the better, correction of a fault or faults, the process of amending as a motion, bill, Act or Constitution that will provide for its own amendment; an alteration proposed or effected by such process". According to the *Random House Dictionary of the English Language* (Unabridged Edn.) "amendment" means "to alter, modify, rephrase or add to, substract from (a motion, bill, Constitution etc.) by formal procedure, to change for the better, improve, to remove or correct faults". According to Crawford [*Statutory Construction*, (1940 Edn.) page 170] there "are many different definitions of the term amendment, as it applies to legislation. Generally, it may be defined as an alteration or change of something, proposed in a bill or established as law. We are not, however, here concerned with the amendment of the proposed bills, but with the amendment of existing laws. Thus limited, a definition as suitable as any, defines an amendment as a change in some of the existing provisions of statute. Or stated in more detail, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or it is in some way changed or altered in order to make it more complete or perfect or effective". According to these definitions the power to amend means the power to make an addition to or alteration in or substraction from the text. The purpose of addition, alteration or substraction may vary; it may be to make the text or some part of it more complete or perfect or effective. It also appears that the whole text of a law cannot be repealed or abrogated in one step; some part of it must remain while the other is repealed.

---

[47] *CAD*, Vol. X, p. 418.

[48] Grawford: *Statutory Construction* (1948 Edn.) p. 123: *Sutherland*: *Statutory Construction* (1943) Edn.) Vol. 2, pp. 348-349 Halsbury's *Laws of England*, Vol. 36, p. 370, Craies on: *Statute Law*, (1963) Edn., pp. 190, and 201.

[49] Willoughby, *Constitutional Law of the United States*, (1929 Edn.) Vol. I, p. 62.

1886. The Constitution does not define the word "amendment". Article 367(1) applies the General Clauses Act to the interpretation of the Constitution. The Act also does not define "amendment". However, Section 6-A provides that where any Central Act repeals any enactment by which, the text of any Central Act was "*amended by express omission, insertion or substitution of any matter*" the repeal unless different intention appears, shall not affect the continuance of "*any such amendment* made by the enactment so repealed" and in operation at the time of such repeal. Section 6-A shows that "amendment" includes addition, substitution and omission. There is no reason why this definition which was known to the Constitution-makers should not apply to "amendment" in Article 368.

1887. According to the petitioners, "amendment" in Article 368 is used in the narrow sense of making improvements. Now, an improvement may be made not only by an addition, but also by omission or repeal. Thus the curing of an error in the text undoubtedly improves it. According to Hidayatullah, J., it "was an error to include (the right of property) in (Part III)". [*Golaknath case*, (supra) at page 887]. The removal of this error by an amendment under Article 368 will surely improve the text of the Constitution. It will remove the roadblock in the way of implementing Part IV of the Constitution. Further, every mover of an amendment considers his proposal as an improvement in the existing text, and the Court should not substitute its own evaluation for that of the mover of the amendment.

1888. The grants of legislative power are ordinarily accorded the widest amplitude. A fortiori, the constituent power in Article 368 should receive the same hospitable construction. The word "amendment" should be so construed as to fructify the purpose underlying Article 368. The framers of the Constitution have enacted Article 368 for several reasons. First, the working of the Constitution may reveal errors and omissions which could not be foreseen by them. Article 368 was designed to repair those errors and omissions, Second, the Court's construction of the Constitution may not correspond with the Constitution-makers' intention or may make the process of orderly government difficult. The First Amendment to the Constitution became necessary on account of the decision of this Court in the *State of Madras* v. *Srimathi Champakam Dorairajan*,[50] and the decision of the Patna

---

[50] 1951 SCR 525: AIR 1951 SC 226: 1951 SCJ 313.

SCC Online

High Court in *Kameshwar Singh* v. *State of Bihar*.[51] Third, the Constituent Assembly which framed the Constitution was not elected on adult franchise and was in fact not fully representative of the entire people. On January 22, 1947, Jawaharlal Nehru said: "We shall frame the Constitution, and I hope it will be a good Constitution, but does anyone in this House imagine that when a free India emerges it will be bound down by anything that even this House might lay down for it? A free India will see the bursting forth of the energy of a mighty nation. What it will do and what it will not, I do not know, but I do know that it will not consent to be bound down by anything.........It may be that the Constitution, this House may frame may not satisfy an India, the free India. This House cannot bind down the next generation or people who will duly succeed us in this task".[52] On November 8, 1948 he reiterated; "While we who are assembled in this House undoubtedly represent the people of India, nevertheless, I think it can be said and truthfully that when a new House, by whatever name it goes, is elected in terms of this Constitution and every adult in India has the right to vote, the House that emerges then will certainly be fully representative of every section of the Indian people. It is right that that House elected so............should have an easy opportuuity to make such changes as it wants to........".[53] The Constitution-makers conferred very wide amending power on Parliament because it was believed that Parliament elected on adult franchise would be fully representative of the entire people and that such a Parliament should receive a right to have a fresh look at the Constitution and to make such changes therein as the entire people whom it represents desire. Fourth, at the apex of all human rights is the right of self-preservation. People collectively have a similar right of self-preservation. Self-preservation implies mutation, that is, adaptation to the changing environment. It is in the nature of man to adjust himself to the changing social, economic and political conditions in the country. Without such adaptation the people decays (*sic*) and there can be no progress. Kant said: "One age cannot enter into an alliance on oath to put the next age in a position when it would be impossible for it to extend and correct its knowledge; or to make any progress whatsoever in enlightenment. This would be a crime against human nature whose original destiny lies precisely in such progress. Later generations are thus perfectly entitled to dismiss these agreements as unauthorised and criminal".[54]

1889. Speaking in the same vein, Jawaharlal Nehru said: "In any event we should not make a Constitution such as some other great countries have, which are so rigid that they do not and cannot be adapted to changing conditions. Today—especially, when the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly applicable tomorrow. Therefore, while we make a Constitution which is sound and as basic as we can, it should also be flexible".[55]

1890. Article 368 is shaped by the philosophy that every generation should be free to adapt the Constitution to the social, economic and political conditions of its time. Most of the Constitution-makers were freedom-fighters. It is difficult to believe that those who had fought for freedom to change the social and political organisation of their time would deny the identical freedom to their descendents to change the social,

---

[51] AIR 1951 Pat 91: ILR 30 Pat 454.

[52] *CAD*, Vol. 2, pp. 322-323.

[53] *CAD*, Vol. 7, pp. 322-323.

[54] Kant's *Political Writings*, Edited by Hans Reise, Cambridge University Press, 1970, p. 57.

[55] *CAD*, Vol. 7, p. 322.

SCC Online

economic and political organisation of their times. The denial of power to make radical changes in the Constitution to the future generation would invite the danger of extraordinary constitutional changes of the Contitution. "The State without the means of some change is without means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve."[56]

1891. The context also reinforces the widest meaning of the word "amendment". The proviso to Article 368 states that if an amendment of the Constitution seeks to make any "change" in the provisions specified therein, such amendment shall also require the ratification by at least half of the State Legislatures. Thus the proviso contemplates and amendment by way of a 'change' in certain provisions of the Constitution. According to the *Shorter Oxford English Distionary* (3rd Edition, Vol. I, page 291) "change" means "substitution, or succession of anything in place of another; alteration in the state or quality of anything, variation, mutation, that which is or may be substituted for another of the same kind". The power to amend accordingly includes the power to substitute one provision for another. For instance, it will be open to Parliament to remove List II in the Seventh Schedule and substitute another List therefor by strictly following the procedure prescribed in Article 368 and its proviso. The words "amendment" and "amend" have been used in Articles 107(2), 108(1) and (4), 109(3), 110(1)(*b*), proviso to Article 111, Articles 147, 196(2), 197(1)(*c*) and (2)(*c*), 198 (3), 199(1)(*b*), 200, 201 and 395. In all these provisions those words include the power of repeal or abrogation. Article 110(1)(*b*) provides that a Bill shall be deemed to be a Money Bill if it contains a provision dealing with "the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India". Without doubt, the word "amendment" would also include repeal or abrogation of a law with respect to any financial obligation undertaken or to be undertaken by the Government of India. The word "amendment" cannot be confined to mere minor changes. To the same effect is Article 199(1)(*b*) in relation to the States. Article 147 provides that in Chapter IV of Part V and in Chapter V of Part VI reference to any substantial question of law as to the interpretation of the Constitution shall be construed as including a reference to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment "amending or supplement that Act"). Here also the word "amending" would take in any enactment which has repealed any provision of the Government of India Act, 1935. Article 395 provides that the "Indian Independence Act, 1947 and the Government of India Act, 1935, together with all other enactments amending or supplementing to law......are hereby repealed". Here again, the word "amending" includes an enactment which has repealed any provision of the Government of India Act, 1935. It cannot be said that the framers of the Constitution intended to continue an enactment which has repealed an essential provision of the Government of India Act, 1935.

1892. Paragraph 7 of Schedule V to the Constitution reads: "(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as reference to such Schedule as so amended:. (2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368".

---

[56] Burke: *Recollections on the Revolution in France and other writings*, Oxford University Press, 1958 Reprint p. 23.

1893. In Paragraph 7(1) the words "addition, variation, or repeal" do not enlarge the meaning of "amend"; they are expositive of it. If the word "amendment" in Article 368 did not include the power of repealing a provision of the Constitutton, sub-paragraph (2) could not have been enacted. It has been held by the this Court that Parliament may change the boundaries of a State by a law enacted under Article 3 or by an amendment of the Constitution under Article 368. (*Berubari Union,* supra). It would follow from this decision that Parliament may repeal any provision of Schedule V by an ordinary law enacted under Paragraph 7 of Schedule V or by an amendment under Article 368. The amending power under Article 368 which provides for amendment of the Constitution by a more difficult procedure than the one by which any provision of Schedule V may be repealed under Paragraph 7 cannot surely be narrower than the power under Paragraph 7 of Schedule V. The same consideration equally applies to Paragraph 21 of Schedule VI to the Constitution.

1894. According to Article 33 Parliament may by law determine to what extent any of the rights conferred by Part III shall in their application to the members of the Armed Forces or forces charged with the maintenance of public order be restricted or abrogated so as to ensure better discharge of their duties and the maintenance of discipline amongst them. It is open to Parliament to make a law abrogating the fundamental rights of the citizens for the time being employed in the Army and the forces charged with the maintenance of public order. For instance, it is open to it to make a law abrogating the freedom of speech of persons employed in the Army. For the reasons already discussed in relation to Paragraph 7 of Schedule V, it cannot be disputed that Parliament may abrogate the fundamental rights of the citizens employed in the Army or forces charged with the maintenance of public order in the exercise of the amending power under Article 368.

1895. The power of a Constituent Assembly, which is a representative body, to frame a Constitution is unlimited and unconfined. Its absolute power is explained by the fact that it is called upon to chart a process of Government of a country. In carrying out its task it has to take decisions on matters of high policy. The high power is made to match the high purpose. The nature of the power conferred on Parliament by Article 368 is similar to the power exercisable by a Constituent Assembly. Therefore, the amending power in Article 368 is as unlimited and unconfined as the power of a Constituent Assembly. Indeed, it may truly be said that Parliament acts as a Continual Constituent Assembly.

1896. The history of Article 368 supports the broadest construction of the word "amendment". Article 368 is similar to Article 304 of the Draft Constitution. Article 305 of the Draft Constitution is material for our purpose. It relevantly read: "Notwithstanding anything contained in Article 304, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the Legislature of any State........ shall not be amended during a period of 10 years from the commencement of this Constitution".

1897. Part XIV of the Draft Constitution made reservation of seats in Parliament and State Legislatures for Muslims, Scheduled Castes, Scheduled Tribes and Indian Christians. The word "amended" in Article 305 unmistakably includes the repeal of the provisions prescribing the reservations. As Article 305 was an exception to Article 304, the word "amendment" in Article 304 would include the power of abrogating the reservations. As in Articl 304, so in Article 368 "amendment" should include the sense of repeal and abrogation.

1898. According to Sri Palkhivala, whenever the Constitution-makers intended to confer the power of repeal of any authority, they have expressly said so as in Articles 35(*b*), 252(2), the proviso to Article 254 (2) and Articles 372(1) and (2). In all these provisions the words "alter, repeal or amend" are used with reference to a law. As "amend" would not authorise repeal simpliciter of the entire law, the framers of the Constitution have expressly conceded the power of repealing the entire law. So these provisions do not help the argument of Sri Palkhivala that "amendment" in Article 368 should be given a narrow meaning.

1899. To sum up, the nature, object and history of the amending power and the context of Article 368 leave little room for doubt that the word "amendment" includes the power of repealing or abrogating each and every provision of the Constitution. It may be that Parliament may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. Article 368 permits Parliament to apply not only the physician's needle but also the surgeon's saw. It may amputate any part of the Constitution if and when it becomes necessary so to do for the good health and survival of the other parts of the Constitution.

Meaning of 'Law' in Article 13(2)

1900. There is a distinction between 'Constitution' and 'law'. Ordinarily a 'Constitution' signifies a politico-legal document. President Wilson once said that the U. S. Constitution has been, to a considerable extent, a political document and not a mere 'lawyers document'.[57] On the other hand, in its ordinary sense 'law' signifies a statute or a legislative enactment. Again, a 'Constitution' prescribes the paramount norm or norms, a law prescribed derivative norms. They are derived from the paramount norms. The reckoning of a Constitutional amendment in the eye of law is the same as that of a Constitution. Therefore, ordinarily a constitutional amendment is not law. Significantly, there is, not a whisper of the word 'law' in Article 368.

1901. The context of the word 'law' in Article 13(2) does not show that it includes an amendment of the Constitution made under Article 368. The word 'law' in Article 13(2) obviously does not include a Constitution. No Constitution existing at the time of the commencement of our Constitution and taking away or abridging the fundamental rights of the people conferred by Part III of the Constitution has been brought to our notice in spite of the assiduous research of Sri Palkhivala. Article 13(3) (*a*) provides for an extensive definition of the word 'law' by including things which are not ordinarily regarded as included in it. It mentions an ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. But it does not include the Constitution which in the ordinary sense does not mean 'law'.

---

[57] C.G. Hains: *Role of the Supreme Court in American Government and Politics*, 1944 Edn., p. 44.

1902. A distinction between 'Constitution' and 'law' is made in the Constitution itself. According to Article 60 the President of India has to take the oath that he will preserve, protect and defend "the Constitution and the Law". Article 159 requires the Governor of a State to take the same oath. A Minister of the Union and a State, the Judges of the Supreme Court and High Courts and the Comptroller and Auditor General also take the same kind of oath. If the framers of the Constitution had regarded the Constitution as 'law', they would not have separately mentioned the Constitution in various oaths.

1903. Various provisions of the Constitution indicate that the product which comes into being by following the legislative procedure prescribed in Articles 107 to 111 is called 'law'. The heading over Articles 107 and 196 reads as "Legislative Procedure". When the prescribed legislative procedure is followed, the end-product is law. But when the procedure prescribed in Article 368 is strictly followed, it results in the amendment of the Constitution. The Constitution-makers did not call it 'law'.

1904. Ordinarily fundamental rights avail against the State organs, that is, the Legislature, the Executive and the Judiciary and other agencies of the State. While making an amendment under Acticle 368, Parliament acts as a constituent authority and not as a State organ. The body making a law in accordance with the procedure prescribed under Articles 107 to 111 and an amendment according to the procedure prescribed in Article 368 may be the same, but the two functions are fundamentally different in character. It is common knowledge that often there is a polarisation of various functions in one and the same body. For instance, the House of Lords in Great Britain exercises legislative functions as well as judicial functions. It may pass a Bill by a bare majority of the Lords assembled in a particular session. But all the Lords minus the Lord Chancellor, the Law Lords and such other Lords as have held or are holding high judicial offices cannot decide a civil appeal. On the other hand, three Lords selected from any one of the last three categories of Lords may decide a civil appeal. The functional difference accounts for this apparent paradox of numbers. The members of the Dominion Parliament of India could not, by their unanimous vote, make the Constitution of India. But the same members acting as the Constituent Assembly could, by a bare majority, make the Constitution. The functional difference in making a legislative law and an amendment of the Constitution likewise explains the basic difference in the procedures prescribed in Articles 107 to 111 and Article 368. In case of difference on a Bill between the House of the People and the Council of States, the two Houses may meet unicamerally and pass a legislative measure. The President cannot refuse his assent to a Bill passed by both Houses bicamerally or unicamerally. But an amendment of the Constitution under Article 368 cannot be made by a vote in a joint sitting of the two Houses. The two Houses must meet separately and pass the amending bill by the requisite majority. The President may withhold his assent to the Constitution amending bill. It is on account of the functional difference between law making and Constitution amending that a law passed by the unanimous vote of Parliament according to the procedure in Articles 107 to 111 cannot override any fundamental right. A Bill passed by more than half of the members of each House assembled separately and by two-third of the members present and voting will, however, result in the amending of the fundamental rights.

1905. Legislative power in Article 245 is made 'subject to the provisions of this Constitution'. But Article 368 is not made 'subject to the provisions of this Constitution'. Article 368 places only one express fetter on the amending power that is, the procedural fetter. A substantive fetter on the amending power is accordingly not contemplated by Article 368. The framers of the Constitution were aware of the fact that certain foreign constitutions have expressly put the amending power in substantive fetters. Indeed Article 305 sought to place such a fetter on the Draft Article 304 (corresponding to Article 368). In the absence of clear textual evidence, I am unable to expand the meaning of 'law' in Article 13(2), for an expansive construction would permanently rule out the lawful making of structural reforms in the social, economic and political frame of the country. Speaking on the first amendment to the Constitution following the decision of this Court in *State of Madras* v. *Srimathi Champakan Dorairajan*,[58] on May 29, 1951 Jawaharlal Nehru said: "We have to give them (the weaker sections of the society) opportunities—economic opportunities, educational opportunities and the like: Now in doing that we have been told that we come up against some provisions in the Constitution which rather lay down some principles of equality or some principles of non-discrimination etc. So we arrive at a peculiar tangle. We cannot have equality because in trying to attain equality we come up against some principles of equality. That is a very peculiar position. We cannot have equality because we cannot have non-discrimination because if you think in terms of giving a lift to those who are down, you are somehow effecting the present status quo undoubtedly. Therefore, if this argument is correct, then we cannot make any major change in the status quo, whether economic or in any sphere of public or private activity.[59]

1906. The word "compensation" in the unamended Article 31(2) has been construed by this Court to mean full market value of the acquired property. This construction creates a direct conflict between Article 31(2) and Article 39(*c*). Article 39(*c*) enjoins the State to direct its policy towards securing "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". This object can never be achieved if full market value of the acquired property is to be paid to its owner. The payment of full market value to the owner will change the form of the concentration of wealth from property to cash. The concentration would remain. The history of our National Movement clearly shows that the Constitution-makers were committed to the accomplishment of the objects specified in Part IV of the Constitution. They have expressly declared that those objects are 'fundamental' in the governance of the country. It is accordingly reasonable to think that they have provided for the means of resolving the conflict between Articles 31(2) and 39(*c*) or between Articles 29 and 46. They must have intended that when a conflict arises between the rights in Part III and the obligations of the State in Part IV, that conflict may be resolved by an amendment of the Constitution under Article 368. "My concept of a fundamental rights is something which Parliament cannot touch *save by an amendment of the Constitution.*" (emphasis added) (*S. Krishnan* v. *State of Madras*).[60]

1907. The phrase 'notwithstanding anything in the Constitution' is used in a provision granting power for emancipating the grant from any restrictive provision in the Constitution. As the word 'law' in Article 13(2) is not intended to include an amendment of the Constitution, Article 368 does not open with the non-obstante clause.

---

[58] 1951 SCR 525: AIR 1951 SC 226: 1951 SCJ 313.

[59] *Parliamentary Debates*, Vols. XII-XIII, Part II-1951, pp. 9616-9617.

[60] AIR 1951 SC 301: 1951 SCJ 454: 52 Cri LJ 1103: (1951) SCR 621 at p. 752 per Bose, J.

1908. No unmistaking conclusion can be drawn from the history of Aricle 13(2) as to the meaning of the word 'law'. The Draft Report of the Sub-Committee on Fundamental Rights, dated April 3, 1947, contained an annexure dealing with Fundamental Rights.[61] Clause 2 of the annexure relevantly provided that "any law which may hereafter be made by the State inconsistent with the provisions of this Chapter/Constitution shall be void to the extent of such inconsistency". By a letter of April 16, 1947, the Chairman of the Fundamental Rights Sub-Committee forwarded an annexure on Fundamental Rights to the Chairman, Advisory Committee on Fundamental Rights. Clause 2 of the annexure materially read: "All existing laws or usages in force ....inconsistent with the rights guaranteed under this Constitution shall stand abrogated to the extent of such inconsistency; nor shall the Union or any unit make any law taking away or abridging any such right".[62] On April 23, 1947, the Advisory Committee on Fundamental Rights presented an interim report to the President of the Constituent Assembly. The Report contained an annexure providing for fundamental rights. Clause (2) of the annexure materially read: "All existing laws, notifications, regulations, customs or usages in force ....inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right.[63] Shri K. Santhanam proposed an amendment substituting for the last words in clause (2) the words "Nor shall any such right be taken away or abridged except by an amendment of the Constitution". In his speech he explained that "if the clause stands as it is even by an amendment of the Constitution we shall not be able to change any of these rights if found unsatisfactory or inconvenient............... In order to avoid any such doubts I have moved this amendment.[64] So according to him the amendment was by way of abundant caution. Sardar Vallabh Bhai Patel accepted the amendment. It was put to vote and adopted.[65] The Constituent Assembly thus accepted the position that fundamental rights could be abrogated by a constitutional amendment.

1909. In October, 1947, a Draft Constitution was prepared by the Constitutional Adviser.[66] Section 9(2) of his Draft Constitution materially read: "Nothing in this Constitution shall be taken to empower the State to make any law which curtails or takes away any of the rights conferred by Chapter II of this Constitution except by way of amendment of this Constitution under Section 232 and any law made in contravention of this section shall to the extent of such contravention be void". Although the Constituent Assembly had expressly accepted the amendment of Sri K. Santhanam, the Drafting Committee omitted the words "except by way of amendment of this Constitution". The relevant portion of Article 8(2) of the Draft Constitution read: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this Part shall to the extent of the contravention be void". No explanation for excluding the words "except by way of amendment of this Constitution", which were approved by the Constituent Assembly, is to be found in the records. It is, howerver, important to observe that when the words "except

---

[61] (Shiva Rao, *Framing of India's Constitution*) Vol. II, p. 137.)

[62] *Ibid*, p. 171.

[63] *Ibid*, p. 290.

[64] *CAD*, Vol. 3, pp. 415-416.

[65] *Ibid*, p. 415.

[66] Shiva Rao, supra, p. 7.

SCC Online

by way of amendment of the Constitution" are omitted from Sri K. Santhanam's amendment, the remaining words "nor shall any such rights be taken away or abridged" are quite wide to prohibit the abrogation or abridgment of fundamental rights even by a constitutional amendment. The same effect seems to be produced by the words "nothing in this Constitution" in Section 9(2) of the Draft Constitution prepared by the Constitutional Adviser. But the Drafting Committee substituted Section 9(2) by Article 8(2) of the Draft Constitution. Article 8(2) of the Draft Constitution does not enmesh in plain words all the provisions of the Constitution including Article 304. This may perhaps explain the omission of the words "except by way of amendment of the Constitution", from Article 8(2) of the Draft Constitution. In any case, this history of Article 13(2) does not prove that the Drafting Committee intended to give supremacy to fundamental rights over the Constitution amending power. In this connection it is important to refer to a note from the Constitutional Adviser's office that 'law' in Section 9(2) did not include an amendment of the Constitution.[67]

1910. A careful reading of Dr. B. R. Ambedkar's speeches would show that the Constitution amending power can be used to abrogate or abridge the fundamental rights. On November 4, 1948 he said:

> "The provisions of the Constitution relating to the amendment of the Constitution divide the Articles of the Constitution into *two groups*. In the one group are placed Articles relating to: (*a*) the distribution of legislative powers between the Centre and the State, (*b*) the representation of the States in Parliament; and (*c*) the powers of the Courts. *All other Articles are placed in another group*. Articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of not less than two-third of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these articles did not require ratification by the States."[68] (Emphasis added).
>
> "It is only for amendments of specific matters—and they are only few—that the ratification of the State legislatures is required. *All other articles* of the Constitution are left *to be amended by* Parliament".[69] (Emphasis added)

On another occasion he repeated:

> "Now, what is it we do? We divide the articles of the Constitution *under three* categories. *The first category* is one which consists of articles which can be amended by Parliament by a bare majority. *The second set* of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary is to have two-thirds majority. Then, they can amend it."
>
> Mr. President: "Of members present."
>
> The Honourable Dr. B. R. Ambedkar: "Yes.. Now, we have no doubt but certain articles in a *third category* where for the purpose of

---

[67] Shiva Rao, supra, Vol. IV, p. 26.
[68] *CAD*, Vol. VII, p. 36.
[69] *CAD*, Vol. VII, p. 43.

amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States."[70]

1911. It would appear from these speeches that for the purpose of amendment Dr. Ambedkar has classified all the articles of the Constitution in three categories. The Articles must fit in one or the other of the three categories, for according to him there is no fourth category. Articles in Part III of the Constitution should accordingly fit into one of these categories. It seems to me that having regard to his three fold classification of the Articles it is not fair to interpret his speeches as showing that the Articles in Part III are not at all amendable. The word "not" in the sentence "if the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304" is presumably either a slip of tongue or a printer's devil. When Jawaharlal Nehru said that the fundamental rights were intended to be "permanent in the Constitution", he did not really mean that they are not amendable. His speeches, already quoted by me, would clearly show that he regarded the entire Constitution to be subject to amendment by any future Parliament.

1912. Sri Kamath had moved an amendment to Article 304 which expressly provided for amendment in the provisions of Part III, but that amendment was rejected by the Constituent Assembly. No inference of unamendability of those provisions can be drawn from the rejected of his motion, for the members of the Constituent Assembly might have thought that the language of Article 304 of the Draft Constitution was sufficiently spacious to include an amendment of the provisions of Part III and that accordingly Sri Kamath's motion was unnecessary.

1913. The phrase "Constitution as by law established" in the President's oath would not establish that the Constitution is a law in the ordinary sense of the term The word 'law' in the phrase, in my view means lawful. The phrase would mean "Constitution established in a lawful manner, that is, by the people through their representatives".

1914. The oath of the President to defend "the Constitution and the law" does not bind him to the Constitution as it stood on the day he took the oath. The word 'law' undoubtedly means the law for the time being in force. A variation or repeal of a part of a law would not compromise the oath. In the context of law, the 'Constitution' would mean the Constitution as varied or repealed from time to time.

1915. Sri Palkhivala has contended vigorously that people have reserved to themselves the fundamental rights and that those rights are sacred and immutable natural rights. It seems to me that it is an error to consecrate the rights enumerated in Part III of the Constitution as "sacrosanct" or "transcendental" or to romanticise them as "natural rights" or "primordial rights" or to embalm them in the shell of "inalienable and inviolable" and "immutable".

1916. To regard them as sacrosanct does not seem to comport with the secular virtue of our Constitution. To regard them as "natural rights" or "primordial rights" overlooks the fact that the rights specified in Articles 15, 16, 1/, 18, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 32 were begotten by our specific national experience. They did not exist in India before the Constitution.

---

[70] *CAD*, Vol. IX, pp. 660-663.

SCC Online

1917. The Constitution-makers did not regard the rights mentioned in Part III as 'sacrosanct' or as 'inalienable' and 'inviolable' or as 'immutable'. Jawaharlal Nehru said: "So, if you wish to kill this Constitution make it sacred and sacrosanct certainly. But if you want it to be a dead thing, not a growing thing, a static, unwiedly, unchanging thing, then by all means do so, realising that, that is the best way of stabbing it in the front and in the back. Because whatever the ideas of the 18th century philosophers or the philosophers of the early 19th century..............nevertheless the world has changed within a hundred years—changed mightly".[71]

1918. Articles 15(3), 16(4) and (5), 19(2) to (6), 21, 22, 22(3), 4(*b*) and (7)(*a*) and (*b*), 23(2), 25(1) and (2), 26, 28(2), 31(4), (5) and (6) encumber the rights with manifold unpredictable limitations. Article 19(2) has invested a completely new restriction to free speech, namely, 'friendly relations with foreign states'. Article 33 expressly empowers Parliament to restrict or abrogate the rights in their application to the Army and forces responsible for the maintenance of public order. For a period of five years from May 14, 1954, the 'reasonableness' of restrictions on the rights specified in Article 19 was made unjusticiable in the State of Jammu and Kashmir. Clause (7) added to Article 19 by the President provided that 'reasonable restrictions' in caluses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate legislature in Jammu and Kashmir "deems reasonable". Article 35-A applied to the State by the President made inroads into the rights of employment under the State, the right to acquire property, the right to settlement and the right to scholarship and other aids in the State. Article 303(2) empowers Parliament to make law giving preferences and making discrimination in the matter of inter-State trade if it is necessary to do so for dealing with a situation arising from scarcity of goods in any part of the country. Article 358 suspends rights under Article 19 during the operation of the Proclamation of Emergency under Article 352. Article 359 empowers the President to suspend the rights under Article 32 during Emergency, so that all fundamental rights may be made quiescent. All these provisions prove that the fundamental rights may be taken away or abridged for the good of the people. *Basheshar Nath* v. *The Commissioner of Income Tax*.[72]

1919. Rights in Part III are down right man made. According to Dr. B. R. Ambedkar, they are the 'gift of law'.[73] Articles 13(2), 32(1) and (2) and 359 expressly speak of the fundamental rights as "conferred by Part III". They are thus the creatures of the Constitution. They are called fundamental rights not because they are reserved by the people to themselves but because they are made indestructible by legislative laws and executive action. There is no analogue in the Constitution to the X Amendment of the U. S. Constitution, which expressly speaks of the reservation of powers by the people. It is well to remember that the I Amendment taking away or abrogating certain rights was passed by the Constituent Assembly acting as the Provisional Parliament. It reflects the Constitution-makers' intention that the rights can be abrogated.

1920. The prescription of a more rigid procedure for changing the provisions specified in the proviso to Article 368 underscores the fact that the framers of the Constitution regarded them as more valuable than the provisions of Part III. They attached more value to federalism than to the fundamental rights.

---

[71] *Parliamentary Debates*, Vols. XII, XIII, Part II, pp. 9624-9625.

[72] 1959 Supp 1 SCR 528 at pp. 604-605 per S.K. Das, J., AIR 1959 SC 149: (1959) 35 ITR 190.

[73] *CAD*, Vol. VII, p. 40.

Inherent and implied limitations on amending power

1921. Wanchoo, J., and two other learned judges who associated with him have held that there are no inherent and implied limitations on the amending power in Article 368 [*Golaknath case* (supra) at page 836]. Bachawat and Ramaswami, JJ., shared their opinion. (Ibid, pages 910 and 933). It seems to me that Hidayatullah, J., also did not favour the argument of inherent and implied limitations on the amending power, for he has said: "The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental". (Ibid, page 878).

1922-23. Sri Palkhivala's argument of inherent and implied limitations may be reduced to the form of a syllogism thus:

All legislative powers are subject to inherent and implied limitations.

The constituent power in Article 368 is a legislative power.

Therefore, the constituent power is subject to inherent and implied limitations.

1924. If the major and minor premises in the syllogism are valid, the conclusion also must be valid. But both premises are fallacious. Some legislative powers are not subject to any inherent and implied limitations. Take the case of the War Power. During the course of arguments I had asked Sri Palkhivala to point out any inherent and implied limitation on the War Power, but he could point out none. When the President has issued a Proclamation of Emergency under Article 352, the cardinal principle of federalism is in eclipse. Parliament may make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. [See Article 250(1)]. The executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. Parliament may confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon the Union officers and authorities in respect of a matter not enumerated in the Union List. (See Article 353). The teeth of Article 19 become blunted. (See Article 358). The President may suspend the right to move any Court for the enforcement of fundamental rights. (See Article 359). It would virtually suspend the fundamental rights during Emergency. Article 83(2) provides that the House of the People shall continue for five years from the date appointed for its first meeting. According to its proviso, the period of five years may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time. Evidently during Emergency the War Power of Parliament and the President is at its apogee, uncribbed and uncabined. It has already been shown earlier that the constituent power in Article 368 is not a legislative power. As both premises of the syllogism are fallacious, the conclusion cannot be valid.

1925. According to Sri Palkhivala, an inherent limitation is one which inheres in the structure of Parliament. Parliament consist of two Houses and the President. The House of the People is elected by adult franchise. It is argued that Parliament cannot make any amendment doing away with its structure. Its structure limits its amending potency. It is a big assumption and should not be accepted without proof from the text of the Constitution. The Constitution does not embody any abstract philosophy. It is still seriously debated whether 'birds fly because they have wings' or 'birds have wings because they fly'. Many maintain that function works change in structure. Proviso to Article 83(2), Articles 250, 353, 358 and 359 demonstrate that the structure of our polity and of Parliament suffer change from the tasks of Emergency. Article 368 itself can be amended to enlarge the amending power. The magnitude of the amending power is to be measured by the purposes which it is designed to achieve than by the structure of Parliament.

1926. Implied limitations cannot be spelt out of the vague emotive generalities of the Preamble. 'People', 'Sovereign', Democratic', 'Republic', 'Justice', 'Liberty', 'Equality', and 'Fraternity' are plastic words, and different people have impressed different meanings on them. Slavery had co-existed with democracy and republic. Liberty and religious persecution have walked hand in hand. It was once believed that equality was not compromised by denying vote to the propertyless. Preamble is neither the source of powers nor of limitations on power. [*In re Berubari Union* (supra), page 281].

1927. According to Sri Palkhivala, an implied limitation is one which is implicit in the scheme of various provisions of the Constitution. The scheme of various provisions is to create primary organs of State and to define, demarcate and limit their powers and functions. The Scheme of Article 368, on the other hand, is to re-create the primary organs of State and to re-define, re-demarcate and re-limit their powers and functions if and when it becomes imperative to do so for the good of the people. Accordingly it must plainly have been the intention of the Constitution-makers that Article 368 should control and condition rather than be controlled and conditioned by other provisions of the Constitution. Article 368 is the master, not the slave of the other provisions. Acting under Article 368, Parliament is the creator, not the creature of the Constitution. In one word, it is supreme. As Lord Halifax has said: The "reverence that is given to a fundamental ……………would be much better applied to that supremacy or power, which is set up in every nation in differing shapes, that altereth the Constitution as often as the good of the people requireth it…………… I lay down, then, as a fundamental first, that in every Constitution there is some power which neither will nor ought to be bounded".[74] Jawharlal Nehru also said: "(U) ltimately the whole Constitution is a creature of Parliament".[75]

1928. It is said that Article 368 cannot be used to abrogate any basic, fundamental or essential feature of the Constitution or to damage or destroy the core of any fundamental right. But no accurate test for ascertaining a basic, fundamental or essential feature or the core of a fundamental right has been suggested by Sri Palkhivala. An appeal is made to the trained and perceptive judicial mind to discover the essential features of the Constitution and their core. During the Stuart period in England the King as well as the Parliament were both claiming to defend the fundamentals of English polity. Charles I, declared that he had taken up arms only "to defend the fundamental laws of his Kingdom".[76] On the other hand, Parliamentarians maintained that the right of the people was more truly fundamental than anything based merely on tradition or prescription.[77] Commenting on the remark of Sir John Finch, C. J., (quoted in the opening of this judgment) Maitland said: "(W)ho is to decide what is an ornament and what a substantial part of the crown. The notion of a Constitution above both king and Parliament, limiting to royal acts a proper sphere, limiting to statutes a proper sphere, was no where to be found expressed in any accurate terms, and would satisfy neither king nor nation".[78]

---

[74] Gough, supra, at p. 170.

[75] *CAD*, Vol. IX, p. 1195.

[76] Gough, supra, p. 78.

1929. At the end of the 17th century Lord Halifax derisively remarked, "Fundamental is a pedestal that men set everything upon that they would not have broken. It is a nail everybody would use to fix that which is good for them; for all men would have that principle to be immutable that serves their use at the time. Fundamental is a word used by the laity as the word sacred is by the clergy, to fix everything to themselves they have a mind to keep, that nobody else may touch it.[79]

1930-31. The Constitution-makers who were familiar with the English constitutional history could not conceivably have left undetermind the test of distinguishing the essential features from the non-essential features or their core. The test is writ large in Article 368 itself. Every provision of the Constitution which may be amended only by the procedure prescribed in Article 368 is an essential feature of the Constitution, for it is more set than legislative laws. The test is the rigid procedure. The more rigid the procedure, the more essential the provision amendable thereby. Thus the provisions specified in the proviso to Article 368 are more essential than the rights in Part III. It has already been shown earlier that the fundamental rights, even though an essential feature of the Constitution, are within the sway of the amending power in Article 368. On a parity of reasoning, judicial review of legislation is also amendable. The Constitution creates, enlarges, restricts and excludes judicial review of legislation. [See Articles 32(2), 138, 139, 143, 77(2), 166(2) and 31(4), (5) and (6)]. Article 32(2) is as amendable as any fundamental right in Part III. The word "guaranteed" in Article 32(1) does not testify to its unamendable character. The guarantee is good against the Government organs and not against the constituent power. It may be recalled that on December 9, 1948, Dr. B. R. Ambedkar, while speaking on Article 25 of the Draft Constitution (present Article 32) said: "The Constitution has invested the Supreme Court with these writs and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the Legislature.[80] And this he said in spite of his affirmation that Article 25 is the "very soul" and the "very heart" of the Constitution.

1932. Article 368 places no express limits on the amending power. Indeed, it expressly provides for its own amendment. Parliament and more than half of the States may jointly repeal Article 368 and thus make fundamental rights immutable if they so desire. It is not permissible to enlarge constructively the limitations on the amending power. Courts are not free to declare an amendment void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words. (*A. K. Gopalan* v. *The Union of India*;[81] *Raja Suriya Pal Singh* v. *State of U. P.*[82]

---

[77] Gough, supra, p. 99.

[78] *Constitutional History of England*, supra, p. 300.

[79] Gough, supra, pp. 169-170.

[80] *CAD*, Vol. VII, p. 953.

[81] 1950 SCR 88 at p. 120 per Kania, C.J. and p. 220 per Mahajan, J., AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

[82] *1952 SCR 1056 at p. 1068* per Mahajan, J.: AIR 1952 SC 252, 306: 1952 SCJ 446.

In *Babu Lal Parate* v. *State of Bombay*,[83] the constitutionality of the States Reorganization Act, 1956 was questioned by this Court. The Act provided for the formation of two separate units out of the former State of Bombay: (1) The State of Maharashtra and (2) The State of Gujarat. It also provided for transfer of certain territories from one State to another. The Act was passed under Article 3 of the Constitution. Article 3 has a proviso to the effect that no Bill under the main part of Article 3 shall be introduced in either of the Houses unless, where the proposal contained in the Bill affects the area, boundary or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. The Bill carved out three units out of the State of Bombay, but the Act carved out only two units. It was urged that the word "State" in Article 3 should be given a larger connotation so as to mean not merely the State but its people as well. This according to the argument was the "democratic process" incorporated in Article 3. According to this "democratic process" the representatives of the people of the State of Bomby assembled in the State Legislature should have been given an opportunity of expressing their views not merely on the proposal contained in the Bill but on any subsequent modification thereof. Rejecting this argument, S. K. Das, J., said:

> "(I)t will be improper to import into the question of construction doctrines of democratic theory and practice obtaining in other countries, unrelated to the tenor, scheme and words of the provisions which we have to construe .... It does not appear to us that any special or recondite doctrine of "democratic process" is involved therein".

1933. In the *South India Corporation (P.) Ltd.* v. *The Secretary, Board of Revenue, Trivandrum*.[84] Subba Rao, J., while construing Article 372 observed:

> "Whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution and cannot be built up on the supposed political philosophy underlying the Constitution."

1934. Counsel for the petitioners has relied on *Mangal Singh* v. *Union of India*.[85] The Punjab Reorganization Act, 1966 was enacted with the object of reorganising the State of Punjab. Its constitutionality was questioned in this Court. The argument of the respondent that a law made under Articles 2, 3 and 4 may also make supplemental, incidental and consequental provisions which shall include provisions relating to the set up of the legislative executive and judicial organs of the State was countered by the appellant with the argument that such a wide power Parliament might conceivably exercise to abolish the legislative and judicial organs of the State altogether. Rejecting the counter-argument Shah, J. said:

> "We do not think that any such power is contemplated by Article 4. Power with which the Parliament is invested by Articles 2 and 3 is power to admit, establish or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution and is not power to override the constitutional

---

[83] (1960) 1 SCR 605: AIR 1960 SC 51: 1960 SCJ 107.

[84] (1964)4 SCR 280 at p. 295: AIR 1964 SC 207: (1964)2 SCJ 415: (1964) 15 STC 74.

[85] (1967)2 SCR 109: AIR 1967 SC 945: (1968) 1 SCJ 240.

scheme. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has no effective legislative, executive and judicial organs."

1935. Under Articles 2 and 3 Parliament may by law form a new State, increase or diminish the area of any State, and alter the boundary or name of any State. The power is thus exercisable with reference to a State. The observation of Shah, J., is to be read in the context of Chapters II, III, and IV of Part VI. Chapter II of Part VI provides for the executive structure of a State. Article 155 states that there shall be a Governor for each State. Chapter III of Part VI deals with the structure of the State Legislature. Article 168 provides that for every State there shall be a legislature. The composition of the Legislature, its powers and functions are laid down in this Chapter. Chapter V provides for the structure of the State Judiciary. Article 214 provides that there shall be a High Court for each State. The provisions in these Chapters are mandatory. Parliament, while making a law under Articles 2, 3 and 4, cannot make radical changes in the legislative, executive and judicial administration of a State, for its law-making power is subject to Chapters II, III and V of Part VI.

1936. Sri Palkhivala has invoked natural law as the higher law conditioning the constituent power in Article 368. Natural law has been a sort of religion with many political and constitutional thinkers. But it has never believed in a single Godhead. It has a perpetually growing pantheon, look at the pantheon and you will observe there: 'State of Nature', Nature of Man', 'Reason', 'God', 'Equality', 'Liberty', 'Property', 'Laissez Faire', 'Sovereignty', 'Democracy', 'Civilized Decency', 'Fundamental Conceptions of Justice' and even 'War'.[86]

1937. The religion of Natural Law has its illustrious Priestly Heads such as Chrysippus, Cicero, Seneca, St. Thomas, Acquinas, Grotius, Hobbes, Locke, Paine, Hamilton, Jefferson and Trietschke. The pantheon is not a heaven of peace. Its gods are locked in constant internecine conflict.

1938. Natural Law has been a highly subjective and fighting faith. Its bewildering variety of mutually warring gods has provoked Kelson to remark: "(O)utstanding representatives of the natural law doctrine have proclaimed in the name of Justice or Natural Law principles which not only contradict one another, but are in direct opposition to many positive legal orders. There is no positive law that is not in conflict with one or the other of these principles; and it is not possible to ascertain which of them has a better claim to be recognised than any other. All these principles represent the highly subjective value judgments of their various authors about what they consider to be just or natural.[87]

1939. Article 368 should be read without any preconceived notions. The framers of the Constitution discarded the concept of "due process of law" and adopted the concept of "procedure established by law" in Article 21. It is, therefore, reasonable to believe that they have discarded the vague standard of due process of law for testing the legitimacy of a constitutional amendment. Due process of Law is another name of natural law. The Constitution-makers could have easily imposed any express limitation

---

[86] "In justifying and extolling war as an institution Treitschke appealed "to the laws of human thought and of human nature" which forbid any alternative". H. Lauterpacht: *International Law and Human Rights*, (1950 Edn.) p. 108.

[87] *What is Justice*? University of California Press, 1960, p. 259.

SCC Online

on the content of the amending power. The absence of any express limitation makes me think that they did not surround the amending power with the amorphic penumbra of any inherent and implied limitations.

Judicial Review of Constitutional amendments

1940. The history of this Court from *Gopalan case* (supra) to *Golakhnath case* (supra) brings out four variant judicial attitudes. In *Gopalan case* (supra) the majority of the Court expressly or tacitly acknowledged "the omnipotence of the sovereign legislative power". The Court displayed humility and self-restraint. But two years later in 1952 the Court assumed the posture of a sentinel. In the *State of Madras* v. *V. G. Row*[88] a unanimouts Court spoke thus: "(A)s regards the 'fundamental rights'.. ……………… this Court has been assigned the role of a sentinel on the qui vive". While the Court took care to assure that it has no 'desire to tilt at legislative authority in a crusader's spirit', it added by way of warning that 'it cannot desert its own duty to determine finally the constitutionality of an impugned statute". The Court moved away from its *Gopalan* attitude of humility and self-restraint to the sentinel's role, compounded of self-restraint and self-consciousness. In 1954 the Court moved away a step further. In *Virendra Singh and others* v. *State of Uttar Pradesh*,[89] the Court, making the people its mouthpiece, asserted: "(W)e do not found on the will of the Government, we have upon us the whole armour of the Constitution wearing the breastplate of its protecting provisions and flashing the sword of its inspirations". Perhaps this passage is a faithful drawing of a crusader. But the picture is of a crusader getting ready to set out on a new path. This is the third attitude of the Court. It displays more of self-assertion than of self-suppression. By 1967 *Gopalan* attitude of humility and self-restraint had lost its appeal. With the banner of "natural"; "sacrosanct", and "transcedental" rights in one hand and 'the flaming sword of (the Constitution's) inspiration' in the other, the Court announced in *Golaknath case* (supra) that Parliament cannot take away or abridge the fundamental rights in Part III. This is the fourth attitude of the Court towards judicial review. From *Gopalan* to *Golaknath*, the Court has shifted from one end to the other end of the diagonal, from Parliament's supremacy to its own supremacy.

1941. At the centre of the Court's legal philosophy, there is the rational free-will of the individual. The Court's claim to the guardianship over fundamental rights is reminiscent of the Platonic guardians, the philosopher kings who were to rule over the Republic. The Court's elevation of the fundamental rights recalls Locke, whose notion of liberty involves nothing more spiritual than the security of property and is consistent with slavery and persecution".[90] When the Court surrounds the fundamental rights with the nimbus of 'sacred' and 'sacrosanct', we are reminded of the theories of Grotius and Pufendorf with their theological strains. When the Court declares that the fundamental rights are 'primordial' 'immutable' and 'inalienable' it is banking heavly on Blackstone with the difference that unlike him it is negating the omnipotence of Parliament. When it is claimed that fundamental rights are accorded a "transcedental position" in the Constitution, it is seeking to read Kant's transcendental idealism into the Constitution.

---

[88] 1952 SCR 597: AIR 1952 SC 196: 1952 SCJ 253: 1952 Cri LJ 966.

[89] (1955) 1 SCR 415: AIR 1954 SC 447: 1954 SCJ 705.

[90] Acton: *The History of Freedom and Power*, p. 104.

1942. This philosophy has entailed the subservience of the Directive Principles of State Policy to the fundamental rights. January 26, 1950 became the great divide: on one side of it were those who became endowed with the fundamental rights and enjoyed their blessings; on the other side were those who were formally granted fundamental rights but had no means and capacity to enjoy their blessings. This great divide is to remain for all time to come. But the Constitution-makers had a contrary intention. Said Jawaharlal Nehru: "These (the Directive Principles of State Policy) are, as the Constitution says, the fundamentals in the governance of the country. Now, I should like the House to consider how you can give effect to these principles if the argument which is often being used.........is adhered to, you can't. You may say you must accept the Supreme Court's interpretation of the Constitution. But, I say, then if that is correct, there is an inherent contradiction in the Constitution between the fundamental rights and the Directive Principles of State Policy. Therefore, again it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy."[91]

1943. Article 31(4), (5) and (6) establish beyond doubt that the Constitution-makers intended to give ascendency to the Directive Principles of State Policy over fundamental rights. "It is futile to cling to our notions of absolute sanctity of individual liberty or private property and to wishfully think that our Constitution-makers have enshrined in our Constitution the notions of individual liberty and private property that prevailed in the 16th century when Hugo Grotius flourished or in the 18th century when Blackstone wrote his Commentaries and when the Federal Constitution of the United States of America was framed. We must reconcile ourselves to the plain truth that emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a welfare state by subordinating the social interest in the rights of the community..........Social interests are ever expanding and are too numerous to enumerate or even to anticipate and, therefore, it is not possible to circumscribe the limits of social control to be exercised by the State...........It must be left to the State to decide when and how and to what extent it should exercise this social control".[92]

1944. The Constitution does not recognise the supremacy of this Court over Parliament. We may test legislative laws only on the touchstone of authoritative norms established by the Constitution. Its procedural limitations aside, neither Article 368 nor any other part of the Constitution has established in explicit language any authoritative norms for testing the substance of a constitutional amendment. I conceive that it is not for us to make ultimate value choices for the people. The Constitution has not set up a government of Judges in this country. It has confided the duty of determining paramount norms to Parliament alone Courts are permitted to make limited value choices within the parameters of the Constitutional value choices. The Court cannot gauge the urgency of an amendment and the danger to the State for want of it, because all evidence cannot come before it. Parliament on the other hand, is aware of all factors, social, economic, political, financial, national and international pressing for an amendment and is therefore in a better position to decide upon the wisdom and expediency of it.

---

[91] *Lok Sabha Debates*, 1955, Vol. II, p. 1955.

[92] *State of West Bengal* v. *Subodh Gopal Bose*, 1954 SCR 587 at p. 655 per Das, J.: AIR 1954 SC 92: 1954 SCJ 127.

SCC Online

1945. Reason is a fickle guide in the quest for structural socio-political values. In the trilogy of *Sankari Prasad Singh* v. *Union of India,*[93] *Sajjan Singh* v. *State of Rajasthan,*[94] and *Golaknath case* (supra) the opinion of seven judges prevailed over the opinion of thirteen judges. The reason of the author of the Nicanachean Ethics found reason in slavery. The reason of the impassioned advocate of Unlicensed Printing saw reason in denying freedom of speech to the Catholics. So Schanupenhaur has said: "We do not want a thing because we have sound reasons for it; we find a reason for it because we want it".[95] Pure reason is a myth. Structuring reason is also calculating expediency, computing the plus and minus of clashing values at a particular time, in a particular place and in particular conditions, striking difficult balances.

1946. Structural socio-political value choices involve a complex and complicated political process. This Court is hardly fitted for performing that function. In the absence of any explicit constitutional norms and for want of complete evidence, the Court's structural value choices will be largely subjective. Our personal predilections will unavoidably enter into the scale and give colour to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of the rule of law.

1947. Judicial review of Constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and true republicanism postulate the settlement of social, economic and political issues by public discussion and by the vote of the people's elected representatives, and not by judicial opinion. The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.

1948. I do not believe that unhedged amending power would endanger the interests of the religious, linguistic and cultural minorities in the country. As long as they are prepared to enter into the political process and make combinations and permutations with others, they will not remain permanently and completely ignored or out of power. As an instance, while the Hindu Law of Succession has been amended by Parliament, no legislature from 1950 to this day has taken courage to amend the Muslim Law of Succession. A minority party has been sharing power in one State for several years. Judicial review will isolate the minorities from the main stream of the democratic process. They will lose the flexibility to form and re-form alliances with others. Their self-confidence will disappear, and they will become as dependent on the Court's protection as they were once dependent on the Government's protection. It seems to me that a two-third majority in Parliament will give them better security than the close vote of this Court on an issue vitally affecting them.

1949. Great powers may be used for the good as well as for the detriment of the people. An apprehended abuse of power would not be a legitimate reason for denying unrestricted amending power to Parliament, if the language of Article 368 so permits without stretch or strain. While construing the Constitution, it should be presumed that power will not be abused.

---

[93] 1952 SCR 80: AIR 1951 SC 458: 1951 SCJ 775.

[94] (1965) 1 SCR 933: AIR 1965 SC 845: (1965) 1 SCJ 377.

[95] As quoted in the *Story of Philosophy* by Will Durant at p. 339.

(*A. K. Gopalan* v. *State of Madras* (supra) at pages 320-321 per Das, J.; *Dr. N. B. Khare* v. *State of Delhi*[96]: *In Re Delhi laws Act.*[97]) There is a general presumption in favour of an honest and reasonable exercise of power (*State of West Bengal* v. *Anwar Ali Sarkar.*[98]) We should have faith in Parliament. It is responsible to the people; it cannot ignore any section of them for all time.

1950. Repelling the abuse of power arguments, Das, J. observed:

> "(W)hat, I ask, is our protection against the Legislature in the matter of deprivation of property by the exercise of the power of taxation? None whatever. By exercising its power of taxation by law, the State may deprive us of almost sixteen annas in the rupee of our income. What, I ask, is the protection which our Constitution gives to any person against the Legislature in the matter of deprivation even of life or personal liberty. None, except the requirement of Article 21, namely, a procedure to be established by the Legislature itself and skeleton procedure prescribed in Article 22.................... What is abnormal if our Constitution has trusted the Legislature as the people of Great Britain have trusted their Parliament? Right to life and personal liberty and the right to private property still exist in Great Britain in spite of the supremacy of Parliament. Why should we assume or apprehend that our Parliament.........should act like mad man and deprive us of our property without any rhyme or reason? After all our executive government is responsible to the Legislature and the Legislature is answerable to the people. Even if the Legislature indulges in occasional vagaries, we have to put up with it for the time being. That is the price we must pay for democracy. But the apprehension of such vagaries can be no justification for stretching the language of the Constitution to bring it into line with our notion of what an ideal Constitution should be. To do so is not to interpret the Constitution but to make a new Constitution by unmaking the one which the people of India have given to themselves. That, I apprehend, is not the function of the Court."[99]

1951. The argument of fear, therefore, is not a valid argument. Parliament as a legislature is armed with at least two very vast powers in respect of war and currency. Any imprudent exercise of these two powers may blow the whole nation into smithereens in seconds, but no court has so far sought to restrict those powers for apprehended abuse of power. Democracy is founded on the faith in self-criticism and self-correction by the people. There is nothing to fear from a critical and cathartic democracy.

1952. The conflicts of the mediaeval Pope and the Emperor put on the wane their power as well as their moral authority. Conditions in India today are not propitious for this Court to act as a Hildebrand. Unlike the Pope and the Emperor, the House of the People, the real repository of power, is chosen by the people. It is responsible to the people and they have confidence in it. The Court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and thereby augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of protection of the weaker sections of the people.

---

[96] 1950 SCR 519 at p. 526 per Kania, C. J.: AIR 1950 SC 211: 1950 SCJ 328.

[97] 1951 SCR 747 at p. 1079 per Das, J.: AIR 1951 SC 332: 1951 SCJ 527.

[98] 1952 SCR 284 at p. 301 per Patanjaii Sastri, J.: AIR 1952 SC 75: 1962 SCJ 55: 1952 Cr LJ 510.

[99] 1954 SCR 587: AIR 1954 SC 92: 1054 SCJ 127.

1953. It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a constitutional amendment which makes an endeavour to 'wipe out every tear from every eye'. In so doing the Court will not departing from, but will be upholding the national tradition. The Brihadaranyaka Upanishad says: "Then was born the Law (Dharma), the doer of good. By the law the weak could control the strong". (I.IV, 14) Look at the national emblem, the chakra and satyameva jayate. The chakra stands for motion; satyam is sacrifice. The chakra signifies that the Constitution is a becoming, a moving equilibrium; satyam is symbolic of the Constitution's ideal of sacrifice and humanism. The Court will be doing its duty and fulfilling its oath of loyalty to the Constitution in the measure judicial review reflects these twin ideals of the Constitution.

Twenty-fourth Amendment

1954. It consists of two relevant sections, Sections 2 and 3. These sections have been drawn in the light of various judgments in *Golaknath's case* (supra). Section 2 adds clause (4) to Article 13. As the majority decision in *Golaknath* had taken the view that Article 13(2) is a limitation on the amending power to take away or abridge the fundamental right, clause (4) removes that limitation. Section 3 consists of four clauses. Clause (*a*) substitutes the marginal note to the unamended Article 368. The substituted marginal note reads as "Power of Parliament to amend the Constitution and procedure therefor". Clause (*b*) renumbers the unamended Article 368 as clause (2) and adds clause (1) to it. The new clause (1) calls the amending power as 'constituent power'. It empowers Parliament to amend 'by way of addition, variation or repeal' any provision of the Constitution in accordance with the prescribed procedure. It opens with the well-known phrase "Notwithstanding anything in this Constitution". In the renumbered clause (2) also, that is, the unamended Article 368, there is an amendment. It says that the President shall give his assent to the Bill. Clause (*d*) adds clause (3) to Article 368. It provides that nothing in Article 13 shall apply to any amendment made under Article 368.

1955. It may be observed that except as regards the assent of the President to the Bill, everything else in the 24th Amendment was already there in the unamended Article 368. I have already held to that effect earlier in this judgment. Accordingly, the amendment is really declaratory in nature. It removes doubts cast on the amending power by the majority judgment in *Golaknath's case* (supra) I am of opinion that the 24th Amendment is valid.

1956. The unamended Article 368 imposed a procedural limit to the amending power. The amending Bill could not become a part of the Constitution until it had received the assent of the President. I have held earlier that the President could withhold his assent. After the amendment the President cannot withhold assent. The Procedural restrictions are a part of Article 368. The unamended Article 368 provided for its own amendment. It was accordingly open to Parliament to amend the procedure So I find no difficulty in upholding the amendment that the President "shall give his assent to the Bill".

1957. One thing more, let us assume for the sake of argument that the amending power in the unamended Article 368 was subject to certain inherent and implied limitations. Let us also assume that it was restricted by the provisions of Article 13(2). The unamended Article 368 would impliedly read as "subject to Article 13(2) and any inherent and implied limitations". So the restrictions imposed by Article 13(2) and inherent and implied limitations were a part of the body of Article 368. As Article 368 is itself liable to amendment, these restrictions are now removed by Parliament for they will fall within the ambit of the word "amendment". The phrase "notwithstanding anything in this Constitution" in the newly added clause (1) of Article 368 is apt to sweep away all those restrictions. In the result, the amending power is now free of the incubus of Article 13(2) and inherent and implied limitations, if any.

1958. In my opinion, the whole of the 24th Amendment is perfectly valid.

Section 2 of the 25th Amendment

1959. Section 2 amends Article 31(2). The unamended Article 31(2) obligated the State to pay 'compensation' for any property acquired or requisitioned by it. Section 2 substitutes the word "compensation" by the words "an amount". It also provides that the amount fixed by law or determined in accordance with the principles prescribed by law may be "given in such a manner as may be specified in such law".

1960. The last part of the main part of the amended Article 31(2) also states that "No such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash".

1961. A proviso has also been added to Article 31(2). According to the proviso while making any law providing for the compulsory acquisition of any property of educational institution, established and administered by a minority referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under the law is such as would not restrict or abrogate the rights guaranteed under that clause.

1962. Section 2 adds clause (2-B) to Article 31. Clause (2-B) states that the provisions of Article 19(1)(*f*) shall not affect any law referred to in the amended Article 31(2).

1963. The birth of Section 2 is dictated by the history of Article 31(2). Article 24 of the draft Constitution became Article 31(2). Article 24 was moved by Jawaharlal Nehru in the Constituent Assembly on September 10, 1949. Then he said that compensation could not be questioned "except where it is thought that there has been a gross abuse of law, where in fact there has been a fraud on the Constitution."[2] His construction of Article 24 received support from Sri Alladi Krishnaswami Ayyar and Sri K. M. Munshi. Sri K. M. Munshi narrated his personal experience. In 1938 the Bombay Government acquired the Bardoli lands. In one case the property acquired was worth over rupees five lakhs. It was sold during the Non-co-operation Movement to an old Diwan of a native State for something like Rs. 6,000/-. The income from that property was about Rs. 80,000/- a year. The Diwan had received that income for about 10 years. The Bombay Legislature acquired the property by paying compensation equal to the amount invested by the Diwan in the property plus 6%. In direct opposition to the manifest intention of the Constitution-makers, this Court held that the word "compensation" in Article 31(2) means "full cash equivalent". (*The State of West Bengal* v. *Mrs. Bela Banerjee*).[3]

---

[2] *CAD*, Vol. IX, p. 1193.

1964. To give effect to the intention of the Constitution-makers, Article 31(2) was amended by the 4th Amendment to the Constitution in 1955. The 4th Amendment added to Article 31(2) these words: "and no such law shall be called in question in any court on the ground that the compensation provided by law is not adequate". The effect of the 4th Amendment was considered by this Court in *P. Vajravelu* v. *Special Deputy Collector, Madras.*[4] Subba Rao, J., said:

> "The fact that Parliament used the same expressions, namely, 'compensation' and 'principles' as were found in Article 31 before the amendment is a clear indication that it accepted the meaning given by this Court to those expressions to *Mrs. Bela Banerjee's case* (supra). It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like 'price', 'consideration' etc."[5]

Regarding the amendment he said:

> "(A) more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate, a law is made to acquire a house; its value at the time of the acquisition has to be fixed; there are many modes of valuation, namely, estimate by an engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value. But nonetheless they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for its relates only to the question of adequacy. On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired it may be said that they are not principles contemplated by Article 31(2)."[6]

1965. In *Union of India* v. *Metal Corporation*[7] Subba Rao, J., spoke again on the implications of the Fourth Amendment. He said:

> "The law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which

---

[3] 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.

[4] (1965) 1 SCR 614: AIR 1965 SC 1017 : (1964) 2 SCJ 703.

[5] *Ibid*, at p. 626.

[6] *Ibid*. p. 627.

[7] (1967) 1 SCR 255 at pp. 264-265: AIR 1967 SC 637; (1967) 1 SCJ 182: 37Com Cas 1.

SCC Online True Print
SCC Online Web Edition, © 2025 EBC Publishing Pvt. Ltd.
Page 756 Monday, October 20, 2025
Printed For: Shadab khan, Jamia Millia Islamia
TruePrint™ source: Supreme Court Cases, © 2025 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law. The validity of the principles judged by the above tests falls within judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction."

1966. These two decisions neutralised the object of the 4th Amendment. In *State of Gujarat* v. *Shantilal Mangaldas*.[8-9] this Court overruled the *Metal Corporation case*. Shah, J., said at page 363 of the Report: (p. 527, para 39).

> "Right to compensation in the view of this Court was intended by the Constitution to be a right to a just equivalent of the property of which a person was deprived. But the just equivalent was not capable of precise determination by the application of any recognised principles. The decisions of this Court in the two cases—*Mrs. Bela Banerjee's case* (supra) and *Subodh Gopal Bose's case* (supra) were therefore likely to give rise to formidable problems, when the principles specified by the Legislature as well as the amounts determined by the application of those principles were declared justiciable. By qualifying 'equivalent' by the adjective 'just' the enquiry was made more controversial; and apart from the practical difficulties *the law declared by this Court also placed serious obstacles in giving effect to the directive principles of State policy incorporated in Article 39.*" (emphasis added).

He added: (pp. 365-66 of SCR: pp. 529-30 of SCC).

> "If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent . ...(I)t does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be held by the Courts, for, to do so would be to grant a charter of arbitrariness, and permit a device to defeat the constitutional guarantee. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that adequacy of compensation provided is not justiciable."[9]

1967. *Shantilal Mangaldas case* (supra) transfused blood in the 4th Amendment made anaemic by *Vajravelu case and Metal Corporation case* (supra). But soon thereafter came the majority decision in *R. C. Cooper* v. *Union of India*.[10] *Cooper case* (supra) in substance overruled *Shantilal Mangaldas case* (supra) and restored the old position. More, it also added the test of Article 19(1)(*f*) to valid acquisition of property. These decisions of the Court constrained Parliament to enact Section 2 of the 25th Amendment.

1968. Having regard to this history, it will not be proper to import the concept of compensation in Article 31(2), Section 2 has substituted the word 'compensation' by the word 'amount' at every relevant place in Article 31(2). The Court should not minimise or neutralize its operation by introducing notions taken from or inspired by the old Article 31(2) which the words of Section 2, are intended to abrogate and do abrogate.

[8-9] (1969) 3 SCR 341: (1969) 1 SCC 509.

[10] (1970) 3 SCR 530: (1970) 1 SCC 248.

SCC Online

1969. According to *Webster's Dictionary on Synonyms*, (1st Edn., page 47) the word 'amount' means 'sum, total, quantity, number, aggregate, whole'. According to the *Shorter Oxford English Dictionary*, the word 'principle' means 'that from which something takes its rise, originates or derives'. The word 'adequate', according to the same Dictionary, means 'equal in magnitude or extent, commensurate in fitness, sufficient, suitable'. According to the *Words and Phrases* (Permanent Ed. Vol. II, p. 363) the word adequate "some time means that which is equal to the value; but in its primary and more properly significance nothing can be said to be adequate which is not equal to what is required, suitable to the case or occasion, wholly sufficient, proportionate and satisfactory".

1970. Unlike 'compensation' the word 'amount' is not a term of art. It bears no specific legal meaning. The amount fixed by law or determined in accordance with the principles specified by law may be paid partly in cash and partly in kind. In such a case it may often be difficult to quantify the aggregate value of the cash and the thing given. Again, the amount may be paid in such a manner as may be specified in the law. Thus the law may provide for payment of the amount over a long period of years. Article 19(1)(*f*) shall now have no impact on Article 31(2). Having regard to all these circumstances, it is, I think, not permissible to import the notion of reasonableness in Article 31(2) as amended by Section 2. The phrase 'principles on which and the manner in which the compensation is to be determined and given' in the old Article 31(2) is now substituted by the phrase 'amount which may be determined in accordance with such principles and given in such a manner as may be specified in such law'. As the word 'compensation' found place in the former phrase, the Court has held that the principles should be relevant to 'compensation', that is, to the 'just equivalent' of the property acquired. That phrase is no more there now in Article 31(2). The notion of 'the relevancy of principles to compensation' is jettisoned by Section 2. Obviously, where the law fixes the amount, it cannot be questioned in any court on the ground that it is not adequate, that is, not equal to the value of the property acquired or requisitioned. The legislative choice is conclusive. It would accordingly follow that the amount determined by the principles specified in the law is equally unquestionable in courts.

1971. The newly added proviso to Article 31(2) appears to me to fortify this construction. According to the proviso, the law providing for compulsory acquisition of any property of an educational institution which would receive the protection of clause (1) of Article 30, should ensure that the amount fixed by or determined under it for the acquired property would not restrict or '*abrogate*' the right guaranteed under that clause. Now, the object of a proviso is to take out something which is included in the main part of a provision. So the amount payable under the main part of the amended Article 31(2) may be such as would 'abrogate' the right of property of all and sundry. Accordingly it is not permissible to import in the amended Article 31(2) the notions of 'arbitrary amount' or 'illusory amount' or 'fraudulent amount'. As some amount must be paid, the law may be virtually confiscatory, but not literally confiscatory. The position now is akin to the legal position in Section 25 of the Contract Act. Under that provision the adequacy of consideration negotiated by the contracting parties cannot be questioned in court. Most trifling benefit or detriment is sufficient. There is however this difference between Section 25 and Article 31(2). While the consideration is settled by the contracting parties, the amount payable for the acquisition or requisitioning of property is settled by the legislature. Like the former, the latter is also not to be questioned in courts.

1972. Article 31(2) is distinguishable from Articles 31-A, 31-B and 31-C. While some amount is payable under a law protected by Article 31(2), no amount whatsoever may be paid under a law protected by Articles 31-A, 31-B and 31-C. The former may be virtually confiscatory, the latter may be wholly confiscatory. The amount fixed by law or determined in accordance with the principles in such a law is now not justiciable even though it may seem to be an 'arbitrary amount' or "illusory amount' or 'fraudulent amount' by the measure of compensation. The ouster of judicial oversight does not imply that the legislature would act whimsically. The value of the property acquired or requisitioned, the nature of the property acquired or requisitioned, the circumstances in which the property is being acquired or requisitioned and the object of acquisition or requisition will be the guiding principles for legislative determination of amount. The second principle may involve, inter alia, consideration of the income already received by the owner of the property and the social contribution to the value of the property by way of public loans at lower rates of interest, cheap state supply of energy and raw materials, subsidies and various kinds of protection, etc. It should be remembered that the value of a property is the resultant of the owner's industry and social contribution. The owner ought not to receive any amount for the value contributed by society. He is entitled to payment for his own contribution. The third principle will include the element of social justice. It is thus wrong to say that on my interpretation of Article 31(2) the legislatures will act arbitrarily in determining the amount. The amended Article 31(2) does not remove the bar of Article 14. If the amount paid to the owner of property is in violation of the principles of Article 14, the law may even now be struck down. Although the amended Article 31(2), according to my construction of it, will abrogate the right of property, it is constitutional as it falls within the scope of the 24th Amendment which I have held to be constitutional.

Section 3 of the 25th Amendment

1973-74. Section 3 adds Article 31-C to Part III of the Constitution. It reads: "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) and clause (*c*) of Article 39, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislatures of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

1975. Section 3, like Section 2, is made under Article 368 as amended by the 24th Amendment. The provisions of Article 31-C fall within scope of the amended Article 368, and its validity, too, cannot be assailed.

1976. It it pointed ont by Sri Palkhivala that Article 31-C authorises State Legislatures and Parliament as a legislative body to make laws contravening the rights conferred by Articles 14, 19 and 31 and that it, in effect, delegates the power of making amendments in those Articles. Pointedly, the argument is that the Parliament as the constituent power has delegated the constituent power to the Parliament as a legislative body and the State Legislatures.

1977. It is also stressed that the second part of Section 3 arms the legislatures with the absolute power of sheltering laws which violate Articles 14, 19 and 31 and have no relation to the principles specified in Article 39(*b*) and (*c*).

1978. The second part prohibits any court from inquiring whether the law protected by Article 31-C has relevancy to Article 39(*b*) and (*c*) if it contains a declaration that it gives effect to the policy specified in that provision. Howsoever shocking it may seem, it is not an innovation. You will find several articles having a close resemblance to it. Article 77(2) provides that the validity of an order or instrument which is authenticated as provided therein 'shall not be called in question on the ground that it is not an order or instrument made or executed by the President. A similar provision is made in Article 166(2) in relation to the Governor, Article 103(1) provides that if any question arises as to whether a member of either House of Parliament has become subject to any of the qualifications mentioned in Article 102(1), the question shall be decided by the President and 'his decision shall be final'. A similar provision is to be found in Article 192(1) as regards the members of the State Legislature with respect to the decision of the Governor. Article 311(2) gives a right of hearing to an employee sought to be dismissed or removed or reduced in rank. Clause (*b*) of the proviso to the Article enacts that where the appointing authority is satisfied that for some reason it is not reasonably practicable to hold such inquiry, the pre-requisite of hearing may be dispensed with. Clause (3) of Article 311 then enacts that if a question arises whether it is reasonably practicable to hold an inquiry, 'the decision thereon of the authority……shall be final', Article 329(*a*) enacts that notwithstanding anything in the Constitution the validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies made or purporting to be made under Article 327 or Article 328 shall not be called in question in any court. Like these Articles, the second part of Section 3 excludes judicial review to a limited extent.

1979. The main part of Article 31-C consists of two parts. The first part provides that no law giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) and (*c*) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31. The first part may be split up into two: (*a*) giving effect to the policy of the State towards securing, (*b*) the principles specified in Article 39(*b*) and (*c*). Under the first part the Court has to see two things before a particular law can receive protection of Article 31-C. Firstly, the law must have relevancy to the principles specified in Article 39(*b*) and (*c*); secondly, the law should give effect to those principles, Article 39(*b*) provides that the State shall strive to secure that 'the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(*c*) urges the State to strive to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. It may be observed that 'subserve the common good' in clause (*b*) and 'common detriment' in clause (*c*) raise questions of fact. Now, it is possible to imagine a state of affairs where a law having relevancy to the principles specified in Article 39(*b*) and (*c*) may not appear to the Court to subserve the common good or to prevent common detriment. Such a law will not prevail over Articles 14, 19 and 31. Thus the first part retains the Court's power to decide the legal question of the law's relevancy to the principles specified in Article 39(*b*) and (*c*) as well as the factual question of the law's efficacy to subserve the common good or to prevent common detriment. It can test the ends as well as the means of the law.

SCC Online

1980. Coming to the second part, it excludes judicial review—'on the ground that (the law) does not give effect to such policy'. So the law cannot be challenged on the ground that the means adopted by the law are not sufficient to subserve the common good and prevent common detriment. In other words, the sufficiency of the law's efficacy alone is made non-justiciable. The Court still retains power to determine whether the law has relevancy to the distribution of the ownership and control of the material resources of the community and to the operation of the economic system and concentration of wealth and means of production. If the Court finds that the law has no such relevancy, it will declare the law void if it offends the provisions of Articles 14, 19 and 31.

1981. The fate of a provision included in a law containing the requisite declaration but having no relevancy as discussed will be no better. It will also be void if it offends against Articles 14, 19 and 31 unless it is subordinate, ancillary or consequential to any provision having such relevancy or forms an integral part of the scheme of such provision.

Delegation of Amending Power

1982. As Article 368(2) as now amended provides that 'only' Parliament may amend the Constitution by the prescribed procedure, it is said that Parliament may not delegate the constituent power to any extrenuous authority. It is not necessary to decide this question. Assuming that Parliament may not delegate the constituent power, the question still remains whether Article 31-C authorises the State Legislatures and Parliament as a legislative body to amend any part of the Constitution.

1983. The power of the Parliament and State Legislatures to make a law with respect to the principles specified in Article 39(*b*) and (*c*) is derived from Article 246, read with Lists I, II and III of the Seventh Schedule. Their legislative power is however not absolute. It is restricted by various fundamental rights including those in Articles 14, 19 and 31 for Article 13(2) expressly prohibits the legislatures from making a law which will be violative of those rights.

1984. What does Article 31-C seek to do? One, the non-obstante clause in Article 31-C removes the bar of Article 13(2) against law-making with respect to the principles specified in Article 39(*b*) and (*c*). The bar, however, is not removed in respect of all the fundamental rights. It is removed in respect of the rights in Articels 14, 19 and 31 only. Second, Articles 14, 19 and 31 remain operative as a bar against law-making with respect to all matters other than the principles specified in Article 39(*b*) and (*c*). They are in partial eclipse as regards laws having relevancy to the principles specified in Article 39(*b*) and (*c*). This is the true nature and character of Article 31-C. We should be guided by what it really does and not by how it seems, by its effect and not by its semantic garb. Looked at in this manner, Article 31-C is in the nature of a saving clause to Articles 14, 19 and 31. Instead of being placed at the end of each of these articles, it is placed at one place for the sake of drafting elegance and economy. As a saving clause, Article 31-C saves certain kinds of laws from destruction at the hands of Articles 14, 19 and 31.

1985. This effect is brought about directly and immediately by the choice of the constituent power expressed in Article 31-C itself and not by the laws which claim its protection. Those laws do not expressly or impliedly take away or abridge the rights in Articles 14, 19 and 31. The constituent power itself has brought about that effect through Article 31-C. There is therefore no delegation of the constituent power. In *Harishankar Bagla* v. *The*

State of Madhya Pradesh[11] this Court has considered the question of delegation of legislative power. Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 enabled the Central Government to make orders for maintaining or increasing supplies of any essential commodity or for securing for their equitable distribution and availability at fair prices and regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Section 6 provided that any order made under Section 3 would have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act. *It was argued before the High Court* that Section 6 delegated legislative power to the Central Government because an order made under Section 3 had the effect of repealing an existing law. The High Court accepted the argument. But on appeal this Court reversed the judgment of the High Court and held that Section 6 did not delegate legislative power. The Court said:

> "The effect of Section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946 or the orders made thereunder. In other words, the orders made under Section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during rhe continuance of the order made under Section 3 it does not operate in that field for the time being. The ambit of its operation is just limited without there being any repeal of any one of its provisions. Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under Section 3, and the provisions of an existing law, the existing law stands repealed by implication, it seems to us that the repeal is not by any Act of the Parliament itself. By enacting Section 6 Parliament itself has declared that an order made under Section 3 shall have effect notwithstanding any inconsistency in this Order with any enactment other than that Act. This is not a declaration made by the delegate but the Legislature itself has declared its will that way in Section 6. The abrogation or the implied repeal is by force of the order made by the delegate under Section 3. The power of the delegate is only to make an order under Section 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act... ......There is no delegation involved in the provisions of Section 6 at all ...."[12]

1986. These observations squarely apply to the provisions of Article 31-C. I accordingly hold that there is no delegation of the constituent power.

1987. Since the laws claiming protection of Article 31-C themselves do not work an amendment in Articles 14, 19 and 31, it is not necessary that they should pass through the procedure prescribed in Article 368.

---

[11] (1955) 1 SCR 380: AIR 1954 SCR 465: 1954 SCJ 637: 1954 Cr LJ 1322.

[12] *Ibid.*

The meaning of 'distributed' in Article 39(b)

1988. Sri Palkhivala has submitted that the nationalisation of property is not contemplated by the word 'distributed' in Article 39(*b*). But the question does not directly arise at this stage. It will be considered at depth when the constitutionality of various acts which claim the protection of Article 31-C is examined by this Court. I will accordingly not express any final opinion on the meaning of the word 'distributed'. It will be sufficient at this stage to refer to certain aspects briefly. The State is the representative and trustee of the people. A nationalised property is vested in the State. Through the State, the entire people collectively may be said to own property. It may be said that in this way the ownership of the nationalised property is distributed amongst the people represented by the State. (See *Essays in Fabian Socialism*, Constable & Co. Ltd., 1949 Ed: page 40; C. E. M. Joad, *Introduction to Modern Political Theory*, Oxford University Press, 1959, pp. 49-50; W. A. Robson, *Nationalised Industry and Public Ownership*, George Allen and Unwin Ltd., 1960, pages 461, 462, 476 477 and 485).

1989. The draft Article 31(*ii*) became Article 39(*b*). Prof. K. T. Shah moved an amendment to the draft Article to this effect: "that the ownership, control and management of the natural resources of the country in the shape of mines and minerals, wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast of the country shall be vested in and belong to the country collectively and shall be exploited and developed on behalf of the community by the State as represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament.[13]

1990. Replying to Prof. K. T. Shah, Dr. B. R. Ambedkar said: "with regard to his other amendment, viz., substitution of his own clause for sub-clause (*ii*) of Article 31, all I want to say is this that I would have been quite prepared to consider the amendment of Prof. Shah if he had shown that what he intended to do by substitution of his own clause was not possible to be done under the language as it stands. So far as I am able to see, I think the language that has been used in the Draft is much more extensive language which includes the propositions which have been moved by Prof. Shah, and I therefore do not see the necessity".[14]

1991. In Dr. Ambedkar's view the nationalisation of property is included in the word 'distributed' in Article 39(*b*).

29th Amendment

1992. This amendment has added to the Ninth Schedule the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969) and the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971). The effect of the inclusion of these Acts in the Ninth Schedule is that the Acts get the protection of Article 31-B. The argument of Sri Palkhivala is two fold. First, Article 31-B is inextricably dovetailed with Article 31-A and that accordingly any law which is included in the Ninth Schedule should be connected with agrarian reforms which is the object of Article 31-A. If a law included in the Ninth Schedule is not related to agrarian reforms, it cannot bypass Articles 14, 19 and 31. It is not possible to accept this argument. In *State of Bihar* v. *Maharajadhiraja Sir Kameshwar*

---

[13] *CAD*, Vol. VII, p. 506.

[14] *CAD*, Vol. VII, p. 518.

Singh.[15] Patanjali Sastri, C. J. rejected this limited meaning of Article 31-B. The learned Chief Justice observed:

> "There is nothing in Article 31-B to indicate that the specific mention of certain statutes was only intended to illustrate the application of the general words of Article 31-A. The opening words of Article 31-B are not only intended to make clear that Article 31-A should not be restricted in its application by reason of anything contained in Article 31-B and are in no way calculated to restrict the application of the latter Article or of the enactments referred to therein to acquisition of estates."[16]

1993. In *Visheshwar Rao* v. *State of Madhya Pradesh.*[17] Mahajan, J. said:

> "In my opinion, the observation far from supporting the contention raised negatives it. Article 31-B specifically validates certain Acts mentioned in the Schedule despite the provisions of Article 31-A and is not illustrative of Article 31-A, but stands independent of it."

(See also *N. B. Jeejeebhoy* v. *Assistant Collector, Thana*).[18]

1994. The next argument is that the two Kerala Acts which abrogate the fundamental rights of property are void because the amending power in Article 368 cannot be used for that purpose. I have already rejected this argument in connection with the 24th and 25th Amendments. So nothing more need be said about it. I hold that the 29th Amendment is valid.

1995. Let me summarise the discussion.

(1) The majority decision in *Golaknath case* (supra) is not correct and should be overruled.

(2) The word 'amendment' in Article 368 is broad enough to authorise the varying, repealing or abrogating of each and every provision in the Constitution including Part III.

(3) There are no inherent and implied limitations on the amending power in Article 368.

(4) The 24th, 25th and 29th Amendments are valid in their entirety.

(5) According to Article 31(2), the amount fixed by law or determined in accordance with the principles prescribed by such law for the acquired or requisitioned property cannot be questioned in any court.

(6) The last part of Article 31-C does not oust the jurisdiction of courts to examine whether the impugned law has relevancy to the distribution of the ownership and control of the material resources of the community or to the operation of the economic system and the concentration of wealth and means of production.

1996. The Constitution Bench will now decide the cases according to law.

Chandrachud, J.—I wanted to avoid writing a separate judgment of my own but such a choice seems no longer open. We sat in full strength of 13 to hear the case and I hoped that after a free and frank exchange of thoughts, I will be able to share the views of someone or the other of my esteemed Brothers. But, we were overtaken by adventitious circumstances. Counsel all round consumed so much time to explain their respective points of view that very little time was left for us to elucidate ours. And the time factor threatened at one stage to assume proportions as grave as the issues arising in the case. The Court, very soon, will be poorer by the retirement of the learned Chief Justice and that has set a date-line for the judgment. There has not been enough time, after the conclusion of the arguments, for an exchange of draft judgments amongst us all and I have had the benefit of knowing fully the views of only four of us. I deeply regret my inability to share the views of the learned Chief Justice and of Hegde, J., on some of the crucial points involved in the case. The views of Ray, J. and Palekar, J., are fairly near my own but I would prefer to state my reasons a little differently. It is tall to think that after so much has been said by so many of us, I could still present a novel point of view but that is not the aim of this judgment. The importance of the matter under consideration would justify a personal reflection and it is so much more satisfactory in a matter ridden, albiet wrongly, with political overtones, to state one's opinion firmly and frankly so that one can stand one's ground without fear or favour.

---

[15] 1952 SCR 889: AIR 1952 SC 253: 1952 SCJ 354.

[16] *Ibid.* at pp. 914-915.

[17] 1952 SCR 1020 at pp. 1037: AIR 1952 SC 252, 296: 1952 SCJ 427.

[18] (1965) 1 SCR 636 at p. 648 per Subba Rao, J.: AIR 1965 SC 1096.

1998. I do not propose to pin-point every now and then what the various counsel have urged before us, for I apprehend that a faithful reproduction of all that has been said will add to the length, not necessarily to the weight, of this judgment. However, lest I may be misunderstood, particularly after the earlier reference to the counsel consuming so much time, let me in fairness say that I acknowledge with gratitude the immense contribution of the learned counsel to the solution of the intricate problems which arise for decision. Such brilliance, industry, scholarship and precision as characterised the arguments of Mr. Palkhivala, the learned Attorney-General, the learned Advocate-General of Maharashtra and the learned Solicitor-General are rarely to be surpassed. What my judgment contains is truly theirs—if this the least be good, the praise be theirs, not mine.

1999. Lester Bernhardt Orfield, an extreme exponent of the sovereignty of amending power under Article V of the American Constitution, has described that power as 'sui generis'. I will borrow that expression to say that the whole matter before us is truly sui generis. The largest Bench sat for the longest time to decide issues described as being of grave moment not merely to the future of this country but to the future of democracy itself. For a proper understanding of the meaning and scope of the amending provisions contained in Articte 368 of our Constitution, we were invited to consider parallel clauses in the Constitutions of 71 countries of the world spread far and wide, with conflicting social and political philosophies. We travelled thus to new lands like Bolivia, Costa Rica, El Salvador, Gautemala, Honduros, Liberia, Nicaragua, Paraguay, Uruguay and Venezuela. Constitutional sojourns to Australia, Canada, Ceylon, France, Germany, Ireland, Switzerland, U. S. S. R. and U. S. A. were of course of frequent occurrence. These excursions were interesting but not proportioned to their utility, for I believe there is no international yardstick with which to measure the width of an amending power.

2000. We were then taken through the writings of scores of scholars, some of whom have expressed their beliefs with a dogmatism not open to a Judge. There was a faint controversy regarding the credentials of some of them, but I will mention the more-often quoted amongst them, in order to show what a wide and clashing variety of views was fed to us. They are: Granville Austin, James Bryce, Charles Burdick, John W. Burgess,

A. P. Canaway, Dr. D. Conrad, Thomas M. Cooley, Edward S. Corwin, S. A. DeSmith, de Tocqueville, A. V. Dicey, Herman Finer, W. Friedmann, Carl, J. Friedrich, James W. Garner, Sir Ivor Jennings, Arthur Berriedale Keith, Leo Kohn, Harold J. Laski, Bora Laskin, A. H. F. Lefroy, William S. Livingston, William Marbury, C. M. McIlwain, Charles E. Merriam, William B. Munro, Lester B. Orfield, Henry Rottschaeffer, George Skinner, Joseph Story, C. F. Strong, Andre Tunc, Samuel P. Weaver, K. C. Wheare, Hugh E. Willis, Westel W. Willoughby, Woodrow Wilson, W. Anstay Wynes and Arnold Zurcher.

2001. At one end is the view propounded by writers like James Garner (*'Political Science and Government'*) and William B. Munro (*'The Government of the United States'*) that an unamendable Constitution is the worst tyranny of time or rather the very tyranny of time and that such a Constitution constitutes government by the graveyard. At the other end is the view expressed with equal faith and vigour by writers like Dr. Conrad (*'Limitation of Amendment Procedures and the Constituent Power'*), William Marbury (*'The Limitations upon the Amending Power'*—Harvard Law Review, Vol. XXXIII) and George Skinner (*'Intrinsic Limitations on the Power of Constitutional Amendment'*—Michigan Law Review, Vol. 18) that any amending body organised within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority; that the constituent assembly cannot create a second perpetual *pouvoir constituent* above the nation; that it may be safely promised that the power to amend the Constitution cannot include the power to destroy it; that the greatest delusion of the modern political world is the delusion of popular sovereignty—a fiction under which all the dictators have sprung up and thrived; and that men should be afraid that any Judge compliant enough to read into a Constitution a beneficial power patently not there, might at another time be compliant enough to read within it any or all of the guarantees of their liberty for a Judge willing to take orders from a benevolent despot might be equally subservient to a malevolent one. Someone has said in a lighter vein that law comes from the west and Light from the east, but brushing aside such considerations, the conflicting views of these writers, distinguished though they be, cannot conclude the controversy before us, which must be decided on the terms of our Constitution and the genius of our Nation. The learning of these scholars has lighted my path and their views must be given due weight and consideration. But the danger of relying implicitly on everyone of the standpoints of everyone of these authors is apparent from what Andre Tunc said in answer to a question put to him at the end of his lecture on *'Government under Law: A Civilian view'*. He confessed that the picture drawn by him at one time, of the French Law was too rosy and, on a misconception, it was too gloomy of American law and American life; and that, Frenchmen had by and large rectified to some extent their first impression that it could be extremely dangerous to have a 'Government of Judges', according to the famous slogan. That reminds me of what Sir Ivor Jennings has said in his book *'Some Characteristics of the Indian Constitution'* that "It is a useful principle that one should never trust politicians; but it is equally true that in the context of the future one should never trust constitutional lawyers. On the whole the politician of tomorrow is more likely to be right than the constitutional lawyer of today". I will therefore make a spare and studied use of the views of some of these men of learning. But I cannot restrain the reflection, in the strain of Dr. Conrad, that after going through all this erudition, one may well conclude this *tour d' horizon* with the opening quotation of Walter Bagehot's famous treatise: "On all great subject, says Mr. Mill, much remains to be said".

2002. Theories of political science, sociology, economics and philosophy were copiously quoted before us. Some of these contain a valiant defence of the right of property without which, it is said, all other fundamental freedoms are as writ in water. Others propound the view that of all the fundamental rights, the right to property is the weakest, from which the conclusion is said to follow that it was an error to include it in the chapter on Fundamental Rights. Our decision of this vexed question must depend upon the postulate of our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience.

2003. The Charter of United Nations, the Universal Declaration of Human Rights and the European Convention of 1950 were cited to show the significant change in the world thinking towards the rights of individuals which, by these documents have been accorded recognition on an international plane. Will India, the largest democracy in the world, do mere lip service to these precious freedoms and shall it not accord to them their rightful place in the lives of men and in the life of the nation? Such is the dialectical query. Apart from whether the so-called intellectuals—the *classe non classed'*—believe in the communistic millennium of Marx or the individualistic Utopia of Bastiat, the answer to this question must depend upon the stark urgency for striking a balance between the rights of individuals and the general good of the society.

2004. We were also invited to have a glimpse of the social and political philosophies of Grotius (1583—1645), Hobbes (1588—1679), Locke (1632—1704). Wolff (1679—1784), Rousseau (1712—1778), Blackstone (1723—1780), Kant (1724—1804), Bentham (1748—1832) and Hegel (1770—1831). These acknowledged giants of the past—their opinions have a high persuasive value—have expounded with care and deliberation the controversial theory of 'Natural Law' and 'Natural Rights'. Each has his own individualistic approach to the question but arising out of their writings is a far reaching argument that there are rights which inhere in every man as a rational and moral being; that these rights are inalienable and inviolable; and that the core of such of these rights as are guaranteed by the Constitution cannot be damaged or destroyed. The answer to this contention would consist in the inquiry, firstly, as regards the validity of the core and hence the consequences of natural law thinking; and secondly, on whether our organic document supports the inference that natural rights were either recognised by it—explicitly or implicitly—and if so, whether any of such rights were permitted to be reserved by the people without any qualification, so that an individual would be entitled to protect and nurse a minimal core of such rights, uninfluenced by social consideration.

2005. The debates of the Constituent Assembly and of the first Provisional Parliament on which none declined to rely furnished a lively experience. The speeches of Pandit Jawaharlal Nehru, Sardar Vallabhbhai Patel, Dr. Rajendra Prasad, Dr. S. Radhakrishnan, Dr. Ambedkar, Govind Ballabh Pant, Dr. K. M. Munshi, Alladi Krishnaswamy Ayyar, Dr. Shyama Prasad Mookherjee, Acharya Kripalani, Rev. Jerome D' Souza, K. Santhanam, Dr. Punjabrao Deshmukh, H. V. Kamath and others were read out to us in support of the rival stands, mainly touching the question of 'inalienability' of fundamental rights and what in those days was freely referred to as the power of 'Eminent Domain'. Some of the speakers were acknowledged national leaders of high stature, some were lawyers of eminence and some had attained distinction in the undefined field of politics and social reform. Their speeches are inspiring and reflect the temper of the times but we cannot pass on the amplitude of the power of amendment of the Constitution by considering what amendments were moved to the corresponding Article 13 of the Constitution and why those proposals for amendment were dropped or not pursued. Similarly, the fact that the First Amendment to the Constitution was passed in 1951 by members of the Constituent Assembly sitting as the Provisional Parliament cannot relieve us of the task of judicially interpreting the validity of the contention that the Fundamental Rights cannot be abridged or taken away or that the core of the essential features of the Constitution cannot be damaged or destroyed. Jawaharlal Nehru undoubtedly said in the Constituent Assembly that "Hundred of millions of our own people look to us and hundreds of millions of other also look to us; and remember this, that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitution. There should be a certain flexibility. If you make anything rigid and permanent, you stop a Nation's growth, the growth of a living vital organic people,"; and again in the Provisional Parliament that "A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has past its use. It is in its old age already and gradually approaching its death. A Constitution to be living must be growing; must be adaptable; must be flexible, must be changeable. And if there is one thing which the history of political developments has pointed out, I say with great force, it is this that the great strength of the British Nation and the British people has laid in their flexible Constitution. They have known how to adapt themselves to changes, to the biggest changes, constitutionally. Sometimes they went through the process of fire and revolution". But he also said when the Constitution (First Amendment) Bill, 1951, was on the anvil that "………so far as this House is concerned, it can proceed in the manner provided by the Constitution to amend it, if this House so chooses".

2006. "Now, there is no doubt that this House has that authority. There is no doubt about that, and here, I am talking not of the legal or constitutional authority, but of moral authority, because it is, roughly speaking, this House that made the Constitution". Our task is not to pass on the "moral authority" of the Parliament to amend the Constitution but to determine whether it has "legal or constitutional authority" to do so. Applying the same test, the speech which the other of the two chief architects of the Constitution—Dr. Ambedkar—made in the Constituent Assembly can raise no estoppel and decide no constitutional issue. He said: "Now, what is it we do? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or Article 304 (corresponding to present Article 368), all that is necessary for them is to have two-thirds majority. Then they can amend it." Perhaps, there is a slip in the reference to "Part III"—even Homer nods. Perhaps, there is an error on the part of the typist—they often nod. But even granting that the eminent cannot ever err, what was said by Dr. Ambedkar and others in the Constituent Assembly and the Parliament was at best their opinion of law.

The true legal position is for us and none else to decide, though within the limits set by the Constitution.

2007. During the course of arguments, a catena of decisions of several courts were cited before us. I thought when the arguments began—yes, I remember it because the commencement of the case is not that lost in antiquity—that the judgments of this Court will form the focus of discussion, foreign decisions making a brief appearance. But in retrospect, I think I was wrong. Learning, like language, is no one's monopoly and counsel were entitled to invite us to consider how heroically courts all over the world had waged battles in defence of fundamental freedoms and on the other hand how, on occasions, the letter of law was permitted to prevail in disregard of evil consequences. Between such extremes, the choice is always difficult and delicate but it has to be made for, in a matter involving the cherished freedoms of the subject and the powers of the Parliament, I do not want to project my freedom to say, as Justice McReynolds of the American Supreme Court did in the *National Prohibition Cases* (supra) involving the validity of the Eighteenth Amendment to the American Constitution, that I am unable to come to any conclusion. But I am quite clear that I have no use for the advice of Walter Berns (*Freedom, Virtue & The First Amendment, 1957*), that since there can be no freedom to end freedom even if the people desire to enslave themselves, "the Supreme Court must act undemocratically in order to preseve democracy". Nor indeed shall I walk down the garden-path laid by Dale Gibson (*Constitution Amendment and the Implied Bill of Rights*, McGill Law Journal, Volume 12), that "where an issue as vital as the protection of civil liberties is concerned, and where the legislators have demonstrated their inability to provide adequate safeguards, the courts are entirely justified (perhaps even morally obliged) in employing all the ingenuity and imagination at their command to preserve individual rights". Such exhortations have a spartan air which lends colourfulness to arid texts but they overlook the fundamental premise that judges, unlike Manu, are not law-givers. Besides, it cannot ever be too strongly stressed that the power of substantive 'due process of law' available under the Fourteenth Amendment to the American Constitution was considered and rejected by our Constituent Assembly which contained a galaxy of a legal talent. In America, under the due process clause, there was a time when the Supreme Court used to invalidate laws because they were thought to be unwise or incompatible with some particular economic or social philosophy. Thus, in *Lochner* v. *New York*,[19] the law restricting employment in bakeries to 10 hours per day and 60 hours per week was regarded as an unconstitutional interference with the right of adult labourers, *sui juris*, to contract with respect to their means of livelihood. It was decades later that the Court recognised the value and the validity of the dissenting opinion recorded by Justice Holmes:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State Constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. ***The

[19] 49 L. Ed. 937.

> Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. ***But a Constitution……… ……..is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution."

In course of time such shining dissents became the majority view and the due process clause came to be construed as permitting enactment of laws limiting the hours of labour in mines, prohibiting employment of children in hazardous occupations, regulating payment of wages, preserving minimum wages for women and children, the 'Blue Sky Laws' and the 'Man's Best Friend (Dog) laws'. Even laws like the Kentucky statutes requiring Banks to turn over to the protective custody of that State deposits that were inactive for 10 or 25 years were upheld, as not involving taking over the property of the Banks.[20] With this American history before them, the Drafting Committee of the Constituent Assembly chose in Article 21 of our Constitution a phrase of certain import, 'procedure established by law' in place of the vague and uncertain expression 'due process of law'.

2008. We were taken through an array of cases decided by the Privy Council, the Supreme Court of the United States of America, the Supreme Courts of American States, the High Court of Australia, the Supreme Court of Ireland, the High Court of Ireland, the Supreme Court of South Africa and of course our own Supreme Court, the Federal Court and the High Courts. Why, consistently with American practice, we were even referred to briefs which counsel had filed before the Supreme Court in the *Rhode Island case* (supra). We also spent a little time on the judgment of the District Court of New Jersey in the *Sprague case* (supra), a judgment which though reversed in appeal by the Supreme Court, was thought to have a certain relevance.

2009. We began, speaking chronologically, with the decision rendered in 1803 by the American Supreme Court in *William Marbury* v. *James Madison*[21] in which the opinion of the Court was delivered by Chief Justice John Marshall in words whose significance custom has still not staled :

> "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the Legislature, repugnant to the Constitution is void."

We ended with some of the very recent decisions of this Court like the *Bank Nationalisation Case*[22] in which a Bench of 11 Judges held by a majority of 10 to 1 that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 violated the guarantee of compensation under Article 31(2) in that, it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed, the amounts so declared could not be regarded as compensation. In between come several decisions, prominent amongst which are: (1) The Privy Council decisions in *Burah's case* (*1878*), *Attorney-General of Ontario case* (*1911*), *Vacher & Son's case* (*1912*), *McCawley's case* (*1919*), *In re the Initiative and Referendum Act Case* (*1919*), *Threthowan's case* (*1932*), *Moore's case* (*1935*), *Ibralabee's case* (*1964*), *Ranasinghe's case* (*1965*), *Don John Liyanage's case* (*1965*), and *Kariapper's*

---

[20] *Anderson National Bank* v. *Luckett*, 321 US 233.

[21] 2 L. Ed. 69.

[22] (1970)3 SCR 530 : (1970)1 SCC 248.

case (*1967*) ; (2) The decisions of the Federal Court in the *C. P. & Berar Reference* (*1938*), *Subramaniam Chettiyar's case* (*1940*), and *Suraj Narain Anand's case* (*1941*) ; (3) The decisions of American Supreme Court in *Lochner's case* (*1904*), *Hawke* v. *Smith* (*1920*), *The Rhode Island Case* (*1920*), *Dillon* v. *Gloss* (*1920*), *Lesser* v. *Garnett* (*1922*), *Ex parte Grossman* (*1925*), *Sprague's case* (*1931*), *Schneidermen's case* (*1943*) and *Skrupa's case* (*1963*) ; (4) The decisions of the American State Supreme Courts in *Livermore* v. *Waite* (*1894*), *Edwards* v. *Lesseur* (*1896*), *Ex parte Dillon* (*1920*) and *Geigenspan* v. *Boding* (*1920*) ; (5) The decision of the Irish Supreme Court in *Ryan's case* (1935) ; (6) The decisions of the Appellate Division of the Supreme Court of South Africa in *Harris's case* (1952) and in the '*High Court of Parliament Case*' (*1952*) · (7) The decisions of the Canadian Supreme Court in the *Alberta Press case* (*1938*), the *case of Attorney-General of Nova Scotia* (*1950*), *Samur's case* (*1953*) and *Switzman's case* (*1957*) and (8) The decisions of the High Court of Australia in *Engineer's case* (*1920*), *West* v. *Commonwealth of Australia* (*1937*), *South Australia* v. *Commonwealth* (*1942*) and *State of Victoria* v. *Commonwealth* (*1970*).

2010 Most of the decisions of the Privy Council noticed above have an important bearing on the issues arising before us and some of those decisions present a near parallel to our constitutional provisions which require interpretation. They will help a clearer perception of the distinction between 'controlled' and 'uncontrolled' constitutions, which in turn has an important bearing on the patent distinction between laws made in the exercise of constituent power and those made in the exercise of ordinary legislative power conferred by the Constitution. In this distinction would seem to lie an answer to some of the basic contentions of the petitioner in regard to the interpretation of Articles 13 and 368 of the Constitution.

2011. The decisions of American courts may bear examination, but in their application to the problems arising under our Constitution it would be necessary to keep in constant sight some of the crucial differences between the circumstances attendant on the birth of the two Constitutious, the purposed vagueness of theirs and the finical content of ours and the significant disparity in the structure of their Article 5 and our Article 368. In America, an important principle of constitutional liberty is that the sovereignty resides in the people and as they could not in their collective character exercise governmental powers, a written document was by common consensus agreed upon in each of the States. The American Constitution, thus, is a covenant of the sovereign people with the individuals who compose the nation. Then, the Supreme Court of America, as said by Sir Henry Maine, is not only a most interesting but a unique creation of the fathers of the Constitution. "The success of the experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or modern world". In fact, it is said that the history of the United States has been written not merely in the halls of Congress or on the fields of battle but to a great extent in the Chambers of the Supreme Court. The peculiar role played by that court in the development of the nation is rooted, apart from the implications arising out of the due process clause, in the use of a few skeleton phrases in the Constitution. We have drawn our Constitution differently. It is, however, relevant that American courts were time and again asked to pass on the existence of inherent limitations on the amending power and their attitude to that question requires examination of the claim of writers like Edward Corwin that such arguments were brushed aside by the court as unworthy of serious attention. Another aspect of American decisions which has relevance in this matter is the explication of the concept of amendment in cases like

Livermore's (California, *1894*), *McCleary's* (Indiana, *1917*), and *Ex Parte Dillon's* (California, *1920*).

2012. Decisions of the Australian High Court like the *Engineer's case* (supra) the *State of Victoria case* (supra) and the *Melbourne Corporation case* (supra) bear on the central theme of the petitioner's argument that the Parliament which is a creature of the Constitution cannot, in exercise of its powers act in derogation of the implications to be derived, say, from the federal nature of the Constitution. That is, some implications must arise from the structure of the Constitution itself.

2013. The two decisions of the South African Supreme Court [*Harris' case* (supra) and the *High Court of Parliament case* (supra)] may serve to throw some light on the concept that the sovereignty of a Legislature is not incompatible with its obligation to comply with the requirements of form and manner prescribed by the instrument which regulates its power to make law, for a Legislature has no power to ignore the conditions of law-making.

2014. The Canadian cases really bear on the legislative competence of provincial Legislatures in regard to individual freedoms or in regard to criminal matters. In Canada, as many as six different views have been propounded on civil liberties and it would appear that though different judges have voiced their opinion in favour of one or the other of such views, none has pronounced finally in favour of any particular view.

2015. A special word must be said of *Ryan's case* (supra) which was decided by the Irish Supreme Court. It was read out *in extenso* to us and I am free to confess that it evoked in me a quick response. In that case, the three Judges of the Irish High Court and two of the three Judges of their Supreme Court rejected contentions similar to those of the petitioner herein but Chief Justice Kennedy, though he did not deal directly with the meaning of the word 'amendment', read limitations on the meaning of that word as a result of various implications derived from the Irish Constitution. Petitioner relies on the lone voice of the Chief Justice. That it is lone is immaterial for our prupose for, after all, the decisions has but a persuasive value. Respondents not only distinguished the judgment of the learned Chief Justice but contended that the ratio of the decision is clearly' in their favour. *Ryan's case* (supra) became for both sides an 'Irish Golak Nath'.

2016. I have made this compact summary of the decisions to indicate in the first place, that these perhaps are the only decisions which require close consideration out of the vast multitude of those that were convassed before us and secondly, to show the broad trend of judicial thinking on the points pressed upon us. It is impossible, in what I consider to be the true scope of this judgment and unnecessary for what I feel is its real purpose, to deal at length with everyone of these decisions. That task, I think, may well be left to receive a scholarly treatment at the hands of a constitutional writer. As Judges, we are confronted and therefore concerned with practical problems and it is well to remind ourselves that our principal task is to construe the Constitution and not to construe judgments. Those judgments are, without doubt, like lamp-posts on the road to freedom and judges who have shed on that road the light of their learning and the impress of their independence, have carved for themselves a niche in the history of civil liberties. *See* what Frankfurter, J., said in *Joint Anti-Fascist Ref. Comm.* v. *McGrath*[23]: 'Man being what he is, cannot safely be trusted

---

[23] 341 US 123, 171.

SCC Online

with complete immunity from outward responsibility in depriving others of their rights'' or, what Jackson, J., said in *American Comm. Assoc.* v. *Douds*[24]: "Our protection against all kinds of fanatics and extremists none of whom can be trusted with unlimited power over others, lies not in their forbearance but in the limitations of our Constitution'' ; or, what Patterson, J., said in his famous charge to the Jury in *Von Horne's Lessee* v. *Dorrance*[25]: "The Constitution ...……is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events………… One encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed''. These are sonorous words and they will resound through the corridor of Times. But these landmarks in the development of law cannot be permitted to be transformed into weapons for defeating the hopes and aspirations of our teeming millions,—half-clad, half-starved, half-educated. These hopes and aspirations representing the will of the people can only become articulate through the voice of their elected representatives. If they fail the people, the nation must face death and destruction. Then, neither Court nor Constitution will save the country. In those moments of peril and disaster, rights and wrongs are decided not before the blind eyes of justice, not under the watchful eyes of the Speaker with a Marshal standing by but, alas, on streets and in-by-lanes. Let us, therefore, give to the Parliament the freedom, within the framework of the Constitution, to ensure that the blessings of liberty will be shared by all. It is necessary, towards that end, that the Constitution should not be construed in a "narrow and pedantic sense''.[26] Rules of interpretation which govern other statutes also govern a constitutional enactment but those "very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be''.[27] To put it in the language of Sir Maurice Gwyer, C. J., "a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*''.[28] In the exercise of our powers of judicial review, let us therefore not act as a check of the past on the present and the future, "…… ..it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy''[29]. The core of social commitment is the quintessence of our Constitution and we must approach it in the spirit in which it was conceived. We erected the edifice of our Constitution in the hope that it will last, unlike the French who, on the establishment of the Third Republic in 1875, framed a Constitution in the hope that it will fail, since the majority of the Constitution-makers were not Republicans but Royalists. In the peculiar conditions in which the French Republic found itself, there

---

[24] 339 US 382, 439.

[25] 1 L. Ed. 391.

[26] Per Lord Wright in *James* v. *Commonwealth of Australia*, (1936) AC 578, 614.

[27] Per Higgins, J., in *Att.-Genl. for New South Wales* v. *Brewery Employees Union*, (1908) 6 Com LR 468, 611-612.

[28] *In re The Central Provinces and Berar Act No. XIV of 1938*, (1939) FCR 18, 87.

[29] Schwartz: *A Basic History of the U. S. Supreme Court.*

SCC Online

was only one throne but three claimants for a seat on it. The social philosophy of our Constitution defines expressly the conditions under which liberty has to be enjoyed and justice is to be administered in our country; and shall I say of our country what Justice Fitzgibbon said of his in *Ryan's case* (supra): "this other Eden Demi-Paradise, this precious stone, set in the silver sea, this plot, blessed this earth, this realm, this" India. If it is not that today, let us strive to make it so by using law as a flexible instrument of social order. Law is not, in the phrase of Justice Holmes, a "brooding omnipotence in the sky".

2017. All through the hearing of the case, there was hardly a point on which Dictionaries and Law Lexicons were not cited. *See* this long list: *The Shorter Oxford English Dictionary on Historical Principles*, 3rd Ed.; *Shorter Oxford English Dictionary*; *Webster's Third New International Dictionary of the English Language*; *Webster's English Dictionary*, 1952; *the Random House Dictionary of the English Language*; *The Reader's Digest Great Encyclopaedic Law Dictionary*; *The Dictionary of English Law*, Earl Jowitt; *The Cyclopaedic Law Dictionary* by Frank D. Moore; Prem's *Judicial Dictionary—Words & Phrases Judicially defined in India, England, U. S. A. & Australia*; Bouvier's: *Law Dictionary*; *Universal English Dictionary*; *Chamber's 20th Century Dictionary*; *Imperial Dictionary* by Ogilvie, *Standard Dictionary* by Funk & Wagnalls; *Stroud's Judicial Dictionary*; *Judicial and Statutory Definitions of Words and Phrases*, Second Series; *Words and Phrases Legally Defined* John B. Saunders; Wharton's *Law Lexicon*; Venkataramaiya's *Law Lexicon, Law Lexicon of British India*—compiled and edited by P. Ramanatha Aiyer; *Words and Phrases*, Permanent Edition: *The Construction of Statutes* by Earl T. Crawford; *Corpus Juris Secundum and American Jurisprudence*. These citations were made in order to explain the meaning, mainly, of the words 'Amendment', 'Constituent', 'Constitution', 'Constitutional law', 'Distribute' and 'Law'. This is of course in addition to several decisions which have dealt with these words and phrases in some context or the other. It is useful to have a dictionary by one's side and experience has it that a timely reference to a dictionary helps avert many an embarrassing situation by correcting one's inveterate misconception of the meaning of some words. But I do not think that mere dictionaries will help one understand the true meaning and scope of words like 'amendment' in Article 368 or 'law' in Article 13(2). These are not words occurring in a school text-book so that one can find their meaning with a dictionary on one's right and a book of grammar on one's left. These are words occurring in a Constitution and one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instrument, in which one part may throw light on another", so that "the construction must hold a balance between all its parts".[30] Such words, having so significant an impact on a power as important as the power to amend the Constitution cannot be read in vacuo. The implication of the social philosophy of the instrument in which they occur and the general scheme of that instrument under which the very object of the conferment of freedoms entrenched in Part III is the attainment of ideals set out in Part IV, must play an important role in the construction of such words. "A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to circumstances and the time in which it is used".[31]

---

[30] Per Lord Wright in *James* v. *Commonwealth of Australia*, (1936) AC 578, 613.

[31] Per Holmes, J., in *Towne* v. *Eisner*, 62 Led. 372, 376.

SCC Online

2018 '*Sui generis*', I called this case. I hope I have not exaggerated its uniqueness. It is manifest that the case has a peculiar delicacy. And now through the cob-webs of 71 Constitutions, dozens of dictionaries, scores of texts and a multitude of cases, I must find a specific answer to the questions raised before us and state it as briefly as I may.

2019. The main argument was made in Writ Petition No. 135 of 1970. The Kerala Land Reforms Amendment Act (35 of 1969) came into force in the State of Kerala on January 1, 1970. The Kerala Land Reforms Amendment Act (25 of 1971) came into force on August 7, 1971. The High Court of Kerala struck down some of the provisions of the Act of 1969 and that judgment was upheld by this Court on April 26, 1972 in *Kunjukutty Sahib, etc.* v. *The State of Kerala and Another.*[32]

2020. Writ Petition No. 135 of 1970 was filed in this Court under Article 32 of the Constitution on March 21, 1970. During the pendency of this Petition, the Constitution 24th, 25th, 26th and 29th Amendment Acts were passed by the Amending Body, that is, the Parliament. The 24th Amendment Act received the President's assent on November 5, 1971. In a House of 518 members of the Lok Sabha, 384 members voted in favour of the 24th Amendment and 23 against it. In a House of 243 members of the Rajya Sabha, 177 members voted in favour and 8 against it. As regards 25th Amendment, 355 voted in favour and 20 against it in the Lok Sabha, while in the Rajya Sabha, 166 voted in favour and 20 against it. The voting on the 29th Amendment in the Lok Sabha was 286 in favour and 4 against. In the Rajya Sabha, 170 voted in favour and none against it.

2021. In August, 1972, the petitioner was permitted by an amendment to challenge the validity of the 24th, 25th and 29th Amendments to the Constitution. These Amendments, after receiving the President's assent, came into force on November 5, 1971, April 20, 1972 and June 9, 1972.

2022. The Constitution (Twenty-Fourth Amendment) Act, 1971 has by Section 2 thereof added a new clause (4) to Article 13 of the Constitution providing that nothing in that article "shall apply to any amendment of this Constitution made under Article 368". Section 3(*a*) of the Amending Act substitutes a new marginal heading to Article 368 in place of the old. The marginal heading of the unamended Article 368 was: "Procedure for amendment of the Constitution". The new heading is: "Power of Parliament to amend the Constitution and procedure therefor". Section 3(*b*) of the Amending Act inserts a new sub-section (1) in Article 368: "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with procedure laid down in this article". Section 3(*c*) makes it obligatory for the President to give his assent to the Amendment Bill. Section 3(*d*) adds a new clause (3) to Article 368 stating that "Nothing in Article 13 shall apply to any amendment made under this article".

2023. The Constitution (Twenty-fifth Amendment) Act, 1971 brings about significant changes in Article 31 and introduces a new Article 31-C. By Section 2(*a*) of the Amendment Act, 1971, clause (2) of Article 31 is substituted by a new clause which permits compulsory acquisition or requisition of property for a public purpose by authority of law, which provides for acquisition or requisitioning of the property "for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law". No such law can be called in question on the ground that the amount is not adequate or that the whole or any part of it is to be given otherwise than in cash. The newly added proviso to Article 31(2) makes an exception in regard to properties of educational institutions of minorities. If such properties are compulsorily acquired, the State has to ensure that the amount fixed for acquisition is such as would not restrict or abrogate the right guaranteed under Article 30(1) of the Constitution. Section 2(*b*) of the Amendment Act, 1971 adds a new clause (2-B) to Article 31 which provides that nothing in Article 19(1)(*f*) shall affect any such law as is referred to in Article 31(2) as substituted. Section 3 of the Amendment Act, 1971, introduces a new Article 31-C, which provides that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles mentioned in Article 39(*b*) or (*c*) shall be deemed to be void on the ground that it takes away or abridges the rights conferred by Articles 14, 19 and 31. No law containing a declaration that it is for giving effect to such policy can be called in question in any court on the ground that it does not give effect to such policy. If such a law is made by the Legislature of a State, the provisions of Article 31-C can apply only if the law receives the assent of the President.

---

[32] (1972)2 SCC 364.

2024. By the Constitution (Twenty-Ninth Amendment) Act, 1972, the two Kerala Acts—Act 35 of 1969 and Act 25 of 1971—were included in the Ninth Schedule thereby giving them the protection of Article 31-B. By such inclusion, the challenge made by the petitioner to these two Acts by his Writ Petition filed in March, 1970 became infructuous, depending upon the validity of the 29th Amendment Act.

2025. Shorn of refinements, the main questions which arise for decision are: (1) What is this true ratio and effect of the decision in the *Golak Nath's case*? (supra) (2) Should that ratio be upheld? (3) If the majority decision in the *Golak Nath's case* (supra) be incorrect, what is the extent of the inherent or implited limitations, if any, on the power of the Parliament to amend the Constitution by virtue of its power under Article 368? and (4) Are the 24th, 25th and 29th Constitution Amendment Acts valid?

2026. The Constitution of India came into force on January 26, 1950 and on June 18, 1951 the Constitution (First Amendment) Act, 1951 was passed by the Parliament. Sections 2, 3, 4 and 5 of the Amending Act made significant amendments resulting to a large extent in the abridgement of Fundamental Rights conferred by Part III of the Constitution. By Section 4, a new Article 31-A was inserted and by Section 5 was inserted Article 31-B for the validation of certain Acts and Regulations. These Acts and Regulations were enumerated in the Ninth Schedule to the Constitution, which itself was added by Section 14 of the Amendment Act.

2027. The validity of the Amendment Act, 1951 was challenged in this Court in *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar.*[33] It was urged in that case that the Amendment Act in so far as it purported to take away or abridge the rights conferred by Part III fell within the prohibition of Article 13(2) and was therefore unconstitutional. Patanjali Sastri, J., who spoke for the unanimous court rejected this argument by holding that although 'law' would ordinarily include constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power

[33] (1952) 1 SCR 89; AIR 1951 SC 458; 1951 SCJ 775.

and constitutional law made in exercise of constituent power; and therefore, in the absence of a clear indication to the contrary, Fundamental Rights were not immune from constitutional amendment. The challenge to the Amendment Act, 1951 was on these grounds rejected.

2028. The Constitution (Fourth Amendment) Act, 1955 abridging the Fundamental Rights guaranteed by Article 31 was passed on April 27, 1955. Section 2 of this Act introduced a radical change by providing that no law to which Article 31(2) was applicable shall be called in question in any court on the ground that the compensation provided by that law was not adequate. By Section 3 of the Amending Act a new and extensive clause (1) was substituted for the old clause (1) of Article 31-A, with retrospective effect. The newly added provision opens with a *non-obstante* clause: "Notwithstanding anything contained in Article 13" and provides that no law providing for matters mentioned in new clauses (*a*) to (*e*) of Article 31-A(1) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. No challenge was ever made to these amendments.

2029. The Constitution (Seventeenth Amendment) Act, 1964 came into force on June 20, 1964. This Act, by Section 2(*ii*) inserted a new definition of "estate" in Article 31-A(2)(*a*) with retrospective effect and added as many as 44 Acts in the Ninth Schedule, thus extending the protection of the Schedule to 64 Acts in all.

2030. The validity of the Seventeenth Amendment Act was challenged before this Court in *Sajjan Singh v. State of Rajasthan.*[34] Out of the several arguments which were urged in that case the only one which is relevant for the present purpose is that the Amendment Act was void in view of the provisions of Article 13(2), in so far as the Act purported to abridge the Fundamental Rights guaranteed by Part III. Delivering the majority judgment Gajendragadkar, C. J., took the view on behalf of himself, Wanchoo and Raghubar Dayal, JJ., that the expression "amendment of the Constitution" plainly and unambiguously means amendment of all the provisions of the Constitution and therefore the amending power conferred by Article 368 extended to all the provisions of the Constitution. The majority judgment rejected the contention that the word 'law' in Article 13(2) would take in Constitution Amendment Act, passed under Article 368, as there was a clear distinction between the constituent power conferred by Article 368 and the ordinary legislative power and Article 13(2) would take in laws made in the exercise of the latter power only. Hidayatullah, J., and Mudholkar, J., concurred in the final conclusion but by separate judgments they doubted the majority view and observed that it was possible that Article 368 merely laid down the procedure for amending the Constitution but did not confer the power to amend the Constitution. Both the learned Judges however stated expressly that they should not be taken to have expressed a final opinion on that question. The seeds of the controversial decision in *I. C. Golak Nath & Others* v. *State of Punjab & Another*[35] were sown by the doubt thus expressed by Hidayatullah, J., and Mudholkar, J.

2031. The decision in the *Golak Nath's case* (supra), was rendered by a Bench of 11 Judges of this Court on February 27, 1967. The petitioners therein had challenged the validity of Punjab Act 10 of 1953 and the Mysore Act 10 of 1962 as amended by Act 14 of 1965, on the ground that these Acts violated their Fundamental Rights, alleging that though the impugned Acts were included in the Ninth Schedule, they did not receive the protection of the 1st, 4th and 17th Amendment Acts. It was common case that if the 17th Amendment which included the impugned Acts in the Ninth Schedule was valid, the Acts would not be open to challenge on any ground.

---

[34] (1965)1 SCR 933: AIR 1965 SC 845: (1965)1 SCJ377.

[35] (1967)2 SCR 762: AIR 1967 SC 1643: (1967)2 SCJ 486.

2032. Chief Justice Subba Rao delivered the leading majority judgment for himself and for Justices Shah, Sikri, Shelat and Vaidialingam. Hidayatullah, J., concurred with their conclusion but delivered a separate judgment. Wanchoo, J., delivered the leading minority judgment on behalf of himself and Justices Bhargava and Mitter. Justice Bachawat and Justice Ramaswami concurred by their separate judgments with the view expressed in the leading minority judgment.

2033. The leading majority judgment recorded the following conclusions:

(1) That Fundamental Rights are the primordial rights necessary for the development of human personality and as such they are rights of the people preserved by the Constitution.

(2) The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving to themselves the Constitution the people have reserved the fundamental freedoms to themselves. The incapacity of the Parliament therefore, in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

(3) Article 368 assumes the power to amend found elsewhere. In other words, Article 368 does not confer power on Parliament to amend the Constitution but merely prescribes the procedure for the exercise of such power to amend.

(4) The power to amend is to be found in Articles 245 and 248 read with Entry 97 in List I of the Seventh Schedule to the Constitution.

(5) In the exercise of the power of amendment, Parliament could not destroy the structure of the Constitution but it could only modify the provisions thereof within the framework of original instrument for its better effectuation. In other words, the provisions of the Constitution could undoubtedly be amended but not so as to take away or abridge the Fundamental Rights.

(6) There is no distinction between the power to amend the Constitution and the ordinary power to make laws.

(7) Article 13(2) which contains an inclusive definition, prima facie takes in constitutional law.

(8) The residuary power of Parliament could be relied upon to call for a Constituent Assembly for making the new Constitution or radically changing it. (This opinion however was tentative and not final).

(9) The Seventeenth Amendment Act impugned before the Court as also the First, Fourth and Sixteenth Amendments were constitutionally invalid. Declaring these amendments invalid was,

however, likely to lead to confusion and chaos and therefore amendments would be deemed to be valid except for future purposes, by application of the principle of 'prospective invalidation'.

(10) In future, Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the Fundamental Rights.

2034. Hidayatullah, J., agreed with the final decision expressed in the leading majority judgment and his views can be summarised as follows:

(1) The power of amendment must be possessed by the State. One could not take a narrow view of the word 'amendment' as including only minor changes within the general framework. By an amendment, new matter may be added, old matter removed or altered.

(2) Article 368 outlines a process which if followed strictly results in the amendment of the Constitution. The article gives power to no particular person or persons.

(3) The procedure of amendment, if it can be called a power at all is a legislative power but it is *sui generis* and outside the three Lists of Schedule Seven of the Constitution.

(4) There is no distinction in our Constitution between laws made ordinarily and laws made occasionally for the amendment of the Constitution. Therefore, constitutional amendments must fall within the scope of Article 13(2).

(5) The whole Constitution is open to amendment, only two dozen articles being outside the reach of Article 368; that too, because the Constitution has made them fundamental.

(6) Fundamental Rights cannot be abridged or taken away by the ordinary amending process, Parliament must amend Article 368 to convoke another Constituent Assembly, pass a law under Item 7 of List I to call a Constituent Assembly and then that Assembly may be able to abridge or take away the Fundamental Rights. The Parliament was constituted with power of legislation which included amendments of the Constitution but only so far as Article 13(2) allowed.

(7) Parliament had no power to amend Article 368 so as to confer on itself constituent powers over the Fundamental Rights. This would be wrong and against Article 13(2).

(8) The conclusion recorded by the leading majority judgment was correct, not on the ground of prospective invalidation of laws but on the ground of acquiescence. The First, Fourth and Seventh Amendments were part of the Constitution by acquiescence for a long time and could not, therefore, be challenged. They also contained authority for the Seventeenth Amendment.

2035. Wanchoo, J., who delivered the leading minority judgment came to the following conclusions:

(1) Both the procedure and the power to amend the Constitution are to be found in Article 368 and not in Entry 97 of List I.

(2) The word 'amendment' must be given its full meaning; that the power was not restricted to improvement of details but extended to the addition to or substitution or deletion of existing provisions.

(3) In exercise of the power conferred by Article 368 it was competent to the Parliament by observing the procedure prescribed therein to amend any provision of the Constitution.

(4) The word 'law' in Article 13(2) could only take in laws made by Parliament and State Legislatures in the exercise of their ordinary legislative power but not amendments made under Article 368.

(5) The power to amend being a constituent power cannot be held to be subject to any implied limitations on the supposed ground that the basic features of the Constitution could not be amended.

Bachawat, J., agreed with Wanchoo, J., and stated :

(1) No limitation on the amending power could be gathered from the language of Article 368. Each and every part of the Constitution could, therefore, be amended under that article.

(2) The distinction between the Constitution and the laws is so fundamental that the Constitution cannot be regarded as a law or a legislative act.

(3) Article 368 indicates that the term 'amend' means 'change'. A change is not necessarily an improvement.

(4) It was unnecessary to decide the contention whether the basic features of the Constitution, as for example, the republic form of government or the federal structure thereof could be amended, as the question did not arise for decision.

2036. Ramaswami, J., adopted a similar line of reasoning and held :

(1) That the definition of 'law' in Article 13(3) did not include in terms 'constitutional amendment'. Had it been intended by the Constitution-makers that the Fundamental Rights guaranteed by Part III should be completely outside the scope of Article 368 it is reasonable to assume that they would have made an express provision to that effect.

(2) The Preamble to the Constitution which declared India as a sovereign democratic republic was not beyond the scope of the amending power; similarly certain other basic features of the Constitution like those relating to distribution of legislative power, the parliamentary power of Government and the establishment of the Supreme Court and the High Courts were also not beyond the power of amendment.

(3) Every one of the articles of the Constitution is amendable under Article 368 and there was no room for any implication in the construction of that article.

2037. It is thus clear that the majority of Judges in the *Golak Nath case* (supra) consisting of Justices Wanchoo, Hidayatullah, Bhargava, Mitter, Bachawat and Ramaswami rejected the argument that Article 368 merely prescribes the procedure to be followed in amending the Constitution. They held that Article 368 also conferred the power to amend the Constitution. They rejected the argument that the power to amend could be found in Entry 97 of List I. The majority of Judges consisting of Subba Rao, C.J., and his 4 colleagues as well as Hidayatullah, J., held that there was no distinction between constituent power and legislative power and that the word 'law' used in Article 13(2) includes a law passed by Parliament to amend the Constitution. Subba Rao, C. J. and his four colleagues suggested that if a Constitution had to be radically altered the residuary power could be relied upon to call for a Constituent Assembly. Hidayatullah, J., took a different view and held that for making radical alterations so as to abridge Fundamental Rights Article 368 should be suitably amended and the Constituent Assembly should be called after passing a law under Entry 97 in the light of the amended provisions of Article 368. It is important to mention that all the eleven Judges who constituted the Bench were agreed that even Fundamental Rights could be taken away but they suggested different methods for achieving that purpose. Subba Rao, C. J., and his four colleagues suggested calling of a Constituent Assembly; Hidayatullah, J., suggested an amendment of Article 368 far calling a Constituent Assembly after passing a law under Entry 97; the remaining five Judges held that the Parliament itself had the power to amend the Constitution so as to abridge or take away the Fundamental Rights.

2038. The leading majority judgment did not decide whether Article 368 itself could be amended so as to confer a power to amend every provision of the Constitution. The reason for this was that the *Golak Nath case* (supra) was decided on the basis of the unamended Article 368. The question whether Fundamental Rights could be taken away by amending Article 368 was not before the Court. The question also, whether in future Parliament could by amending Article 368 assume the power to amend every part and provision of the Constitution was not in issue before the Court. Such a question could arise directly, as it arises now, only after an amendment was in fact made in Article 368, and the terms of that amendment were known. The observation in the leading majority judgment putting restraints on the future power of the Parliament to take away Fundamental Rights cannot, therefore, constitute the ratio of the majority judgment. The learned Judges did not evidently consider that in future the chapter on Fundamental Rights could be made subject to an amendment by first amending Article 368 as is now done under the Twenty-Fourth Amendment.

2039. It shall have been seen that the petitioners in the *Golak Nath case* (supra) won but a Pyrrhic victory. They came to the Court, not for the decision of an academic issue, but to obtain a declaration that the laws which affected their fundamental rights were unconstitutional. Those laws were upheld by the Court but I suppose that the petitioners left the Court with the consolation that posterity will enjoy the fruits of the walnut tree planted by them. But it looks as if a storm is brewing threatening the very existence of the tree.

2040. As stated above, 6 out of the 11 learned Judges held in the *Golak Nath case* (supra) that Article 368 prescribed not merely the procedure for amendment but conferred the power to amend the Constitution and that the amending power cannot be traced to the Residuary Entry 97 of List I, Schedule VII read with Arlicles 245, 246 and 248 of the Constitution. I respectfully adopt this view taken by the majority of Judges.

2041. Part XX of the Constitution is entitled "Amendment of the Constitution", not "Procedure for Amendment of the Constitution". Article 368, which is the only article in Part XX must, therefore, be held to deal both with the procedure and the product of that procedure. The marginal note to Article 368: "Procedure for Amendment of the Constitution" was only a catchword and was in fact partially correct. It did not describe the consequence of the adoption of the procedure because the title of the part described it clearly. The justification of the somewhat inadequate marginal note to Article 368 can be sought in the fact that the article does not confer power on any named authority but prescribes a self-executing procedure which if strictly followed results in this: "The Constitution shall stand amended". The history of the residuary power since the days of the Government of India Act, 1935, and the scheme of distribution of legislative power show that if a subject of legislative power was prominently present to the minds of the framers of the Constitution, it would not have been relegated to a Residuary Entry, but would have been included expressly in the legislative list—more probably in List I. That the question of constitutional amendment was prominently present to the minds of the Constitution-makers is clear from the allocation of a separate Part—Part XX—to "Amendment of the Constitution". Then, the legislative power under Entry 97, List I, belongs exclusively to the Parliament. The power to amend the Constitution cannot be located in that Entry because in regard to matters falling within the proviso to Article 368, Parliament does not possess exclusive power to amend the Constitution. The Draft Constitution of India also points in the direction that the power of amendment cannot be located in the Residuary Entry. Draft Article 304, which corresponds to Article 368, conferred by sub-article (2) a limited power of amendment on the State Legislatures also and those Legislatures neither possessed the residuary power of legislation nor did the State List. List II, include 'Amendment of the Constitution' as a subject of legislative power. Finally, the power to legislate under Article 245 is "subject to the provisions of this Constitution", so that under the residuary power, no amendment could be made to any part of the Constitution, as any amendment is bound, to some extent, to be inconsistent with the article to be amended.

2042. Having located the amending power in Article 368 and having excluded the argument that it can be traced to Entry 97 of List I, it becomes necessary to determine the width and scope of that power. Is the power unfettered and absolute or are there any limitations—express, implied or inherent—on its exercise?

2043. Counsel for the petitioner urges: (1) That the word 'amendment' is not a term of art and has no precise and definite, or primary and fundamental, meaning; (2) That Article 368 carries vital implications by its very terms and there is inherent evidence in that Article to show that in the context thereof the word 'amendment' cannot cover alterations in, damage to, or destruction of any of the essential features of the Constitution; (3) That Article 13(2) by taking in constitutional amendments constitutes an express limitation on the power of amendment; (4) That there are implied and inherent limitations on the amending power which disentitle Parliament to damage or destroy any of the essential features, basic elements or fundamental principles of the Constitution; and (5) That in construing the ambit of the amending power, the consequences of the power being held to be absolute and unfettered must be taken into account. Counsel says that Article 368 should not be read as expressing the death-wish of the Constitution or as being a provision for its legal suicide. Parliament, he says, cannot arrogate to itself, under Article 368, the role of an Official Liquidator of the Constitution. Each of these propositions is disputed by the Respondents as stoutly as they were asserted.

2044. 'Amendment' is undoubtedly not a term of art and the various dictionaries, texts and law lexicons cited before us show that the word has several shades of meaning (see for example the meanings given in *The Shorter Oxford English Dictionary on Historical Principles*, 3rd ed., *Webster's Third New International Dictionary of the English Language*; *The Random House Dictionary of the English Language*; *The Dictionary of English Law*, Earl Jowitt; *Judicial and Statutory Definitions of Words and Phrases*, Second Series; *Words and Phrases legally defined*, John B. Saunders; *Wharton's Law Lexicon*, 14th Ed.: *Words and Phrases Permanent Edition*; and *The Construction of Statutes* by Earl T. Crawford.)

2045. Some of the American State Supreme Courts have taken the view that the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. [See *Livermore* v. *Waite*, (1894) 102 Cal 113; *McFadden* v. *Jordan*, 32 Cal 2d. 330; *Foster* v. *Evatt*, 144 Ohio St. 65]. Another line of decisions, again of the American State Supreme Courts, has accepted a wider meaning of the word 'amendment' so as to include within it even a 'revision' of a constitutional document. (See *Edwards* v. *Lesseur*, 33 Southwestern Reporter, 1120; *Ex Parte Dillon*, 262 Federal Reporter 563; *Staples* v. *Gilmer*, American Law Reports Annotated, Vol. 158, p. 495).

2046. In brief, it would be correct to say that at least three different meanings have been generally given to the word 'amendment'—

(*a*) to improve or better; to remove an error;

(*b*) to make changes which may not improve the instrument but which do not alter, damage or destroy the basic features, essential elements or fundamental principles of the instrument sought to be amended; and

(*c*) to make any changes whatsoever.

2047. These texts and authorities are useful in that they bring a sense of awareness of the constructional difficulties involved in the interpretation of a seemingly simple word like 'amendment'. But enriched by such awareness, we must in the last analysis go to our own organic document for determining whether the word 'amendment' in Article 368 is of an ambiguous and uncertain import.

2048. The various shades of meaning of the word 'amendment' may apply differently in different contexts, but it seems to me that in the context in which that word occurs in Article 368, it is neither ambiguous nor amorphous, but has a definite import.

2049. The proviso to Article 368 furnishes intrinsic evidence to show that the word 'amendment' is used in that article not in a narrow and insular sense but is intended to have the widest amplitude. Article 368 provides that "An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament", and after the Bill is passed by the prescribed majority, "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso says that the amendment shall also require to be ratified by the State legislatures of not less than one-half of the States if "such amendment seeks to make any change in" the matters mentioned in clauses (*a*) to (*e*) of the proviso. "Such amendment" obviously means 'amendment' referred to in the main body of Article 368 and thus the article itself envisages that the amendment may take the form of 'change'. There is in this case a dictionary at every corner for every word and we were referred to various meanings of 'change' also. It is enough to cite the meaning of the word from the *Oxford English Dictionary* (Vol. I, p. 291); "Change: substitution ......of one thing for another. Alteration in the state or quality of any thing". *Webster's 3rd New International Dictionary*, Vol. III, pp. 373-4, gives the same meaning. It is clear beyond doubt that 'change' does not mean only "such an addition......within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed".

2050. Paragraph 7 of Part D of the Fifth Schedule and Paragraph 21 of the Sixth Schedule also furnish similar proof of the meaning of the word 'amendment'. These two paragraphs provide for amendment of the respective Schedules in identical terms;

> "*Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.
>
> (2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368."

2051. Two things emerge from these provisions of Paragraphs 7 and 21 of the Fifth and Sixth Schedules. Firstly, that the concept of "amendment" as shown by clause (1) takes in "addition, variation or repeal" and secondly, that an amendment even by way of "addition, variation or repeal" would fall within the terms of Article 368. It is expressly excepted from the scope of that article so that it may not fall within it, which it otherwise would.

2052. The expression 'amendment' was used in a large number of articles of the Constitution as originally enacted: Articles 4(1), (2), 108(4), 109(3), (4), 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1), (2), (3), 240(2), 274(1), 304(*b*) and 349. A reference to the content and the subject-matter of these articles would show that in almost every one of the cases covered by these articles, 'amendment' would be by way of addition, variation or repeal.

2053. In several provisions of the original Constitution, different expressions were used to indicate conferment of the amending power. Article 35(*b*) called it "altered repealed, amended" Article 243(1) described it as "repeal or amend". The proviso to Article 254(2) described it as "adding to, amending, varying or repealing"; and Article 392(1) used the expression "such adaptations, whether by way of modification, addition or omissions". The English language has a rich vocabulary and there are such nice and subtle differences in the shades of meaning of different words that it is said that there are, in that language, no synonyms. But I find it impossible to believe that the various expressions enumerated above have behind them any calculated purpose or design. Their use may easily, though with a little generosity, be attributed to a common failing to attain elegance of language. Reading more than meets the eye tends to visit the writing with the fate reserved for the poems of Sir Robert Browning. When he wrote them, two persons knew what they meant—he and the God. After hearing the critics, God alone knew what the poet intended!

2054. Constitutions of several countries of the world show that the words 'amendment', 'alteration', 'revision' and 'change' are used promiscuously. The Constitutions of Liberia, Trinidad and Tobago show that there is no difference in meaning between 'amendment' and 'alteration'. Those of Somalia, Jordan, Kuwait, Lebanon, and the Vietnam Democratic Republic show that there is no difference between 'amendment' and 'revision'. The Constitution of Belgium show that the words revision' and 'alteration' are used in the same sense. The Constitution of Barundi shows that 'amendment' denotes 'change'. The Constitutions of Monaco, Costa Rica, Cuba and Nicaragua show that 'amendment' can be total or partial.

2055. Dr. D. Conrad says of Article 368, in "*Limitation of Amendment Procedures and the Constituent Power*" that "it is hardly possible to restrict the legal meaning of amendment to 'improvement', nor can it be denied that by amendment complete articles may be removed or replaced". The author is justified in this view. The Indian Constitution is neither the first written Constitution of the world nor of course the last. Since the time that the first written Constitution, namely the American Constitution, was framed in 1787 until today, the expression 'amendment' is known to occur at least in 57 Constitutions out of 71. It is inconceivable that the power of changing a written instrument of fundamental importance would be so expressed for so long and in the constitutions of so many countries, if the word 'amendment' was of doubtful import.

2056. On August 21, 1946, the Constituent Assembly passed the Government of India (Third Amendment) Act, 1949, which substituted a new Section 291 in the Government of India Act, 1935 giving to the Governor-General the power to make such amendments as he considered necessary, whether by way of "addition, modification or repeal" in certain provisions. Shortly thereafter, that is, on September 17, 1949, the Constituent Assembly debated Article 304 corresponding to present Article 368, using the word 'amendment' simpliciter. In the debate on Article 304 amendment No. 3239 moved by Shri H.V. Kamath which sought to introduce in that article the words "whether by way of variation, addition or repeal" was rejected.

2057. I am unable to read in this legislative history an inference that the word 'amendment' was used in Article 304 in order to curtail the scope of the amending power. It is significant that the Government of India (Third Amendment) Act, 1939 was described in its title as an "Act to further amend the Government of India Act, 1935" and the Preamble stated that it was expedient to amend the Government of India Act, 1935. By Section 4 the old Section 291 was "repealed" totally and the new Section 291 was "substituted". By Section 3 a new sub-section was "inserted". By Section 5 a new item was "substituted" and totally new items Nos. 31-B and 31-C were "inserted". The Act of 1949 therefore leaves no room for doubt that the word 'amend' included the power of addition, alteration and repeal. Apart from this it is well-recognized that the use of different words does not necessarily produce a change in the meaning. (See Maxwell *Interpretation of Statutes*, 12th Edition, pp. 286 to 289;

SCC Online

State of Bombay v. *Heman Alreja*, AIR 1952 Bom 16, 20 per Chagla, C. J., and Gajendragadkar, J.)

2058. Finally, it is important that 5 out of the 11 Judges in the *Golak Nath case*, (supra) took the view, that the word 'amendment' must be given a wide meaning. The leading majority judgment did not consider that question on the ground that so far as Fundamental Rights were concerned, the question could be answered on a narrower basis. Ramaswami, J., also did not consider the meaning of the word 'amendment'. However, Wanchoo, J., who delivered the leading minority judgment, Hidayatullah, J., and Bachawat J., took the view that the word must be given a wide meaning. According to Hidayatullah, J., "By an amendment new matter may be added, old matter removed or altered".

2059. Thus the word 'amendment' in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations. The power contained in Article 368 to amend the Constitution is indeed so wide that it expressly confers a power by clause (*e*) of the proviso to amend the amending power itself. No express restraint having been imposed on the power to amend the amending power, it is unnecessary to seek better evidence of the width of the power of amendment under our Constitution.

2060. Article 368, manifestly, does not impose any express limitations. The reason for this is obvious. The power of amendment is in substance and reality a power to clarify the original intention obscured, for example by limitations of language and experience, so as to adjust the intention as originally expressed to meet new challenges. As a nation works out its destiny, new horizons unfold themselves, new challenges arise and therefore new answers have to be found. It is impossible to meet the new and unforeseen demands on the enervated strength of a document evolved in a context which may have largely lost its relevance. The power of amendment is a safety valve and having regard to its true nature and purpose, it must be construed as being equal to the need for amendment. The power must rise to the occasion. According to Friedrich.[36] "The constituent power bears an intimate relation to revolution. When the amending provisions fail to work in adjusting the constitutional document to altered needs, revolution may result". That is why, the rule of strict construction which applies to a penal or taxing statute is out of place in a Constitutional Act and a "construction most beneficial to the widest possible amplitude" of its powers must be adopted.[37]

2061. If, on the terms of Article 368 the power of amendment is wide and unfettered, does Article 13(2) impose any restraint on that power? Hereby hangs a tale. A majority of Judges held in the *Golak Nath case* (supra) that the power of amendment was to be traced to Article 368. But a majority, differently composed, held that amendment of the Constitution was 'law' within the meaning of Article 13(2) and, therefore, the Parliament had no power to take away or abridge the rights conferred by Part III of the Constitution. This finding contained in the judgment of the leading majority and of Hidayatullah, J., is the nerve of the decision in the *Golak Nath case* (supra). It is therefore necessary to consider that question closely.

---

[36] *Constitutional Government & Democracy*, 4th Ed, p. 139.

[37] *British Coal Corporation* v. *Rex*, 1935 (AC) 500, 518.

2062. I will set out in juxtaposition Articles 13(2), 245 and 368 in order to highlight their inter-relation:

Article 13 (2)	*Article 245*	*Article 368*
The State shall *not make any law* which takes away or abridges the rights conferred by this part.	Subject to the provisions of this Constitution Parliament *may make laws* for the whole for any part of the territory of India.	Amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

(Emphasis supplied)

Article 13(2) clearly echoes the language of Article 245. Article 245 gives the power to 'make laws', while Article 13(2) imposes a limitation on the exercise of the power to 'make laws'. As between the two Articles, *Article 13 (2) is the paramount law for, Article 245 is expressly subject* to all the provisions of the Constitution including Article 13(2).

2063. Article 368 avoids with scrupulous care the use of the word 'law', because there is a fundamental distinction between constitutional law and ordinary law. The term 'constitutional law' is never used in the sense of including the laws made under the Constitution. (*See* Jennings—*The Law and the Constitution*, 5th Ed., pp. 62-65). Constitutional law is the fundamental superior or paramount law. Its authority and sanction are higher than those of ordinary laws. (*Encyclopaedia Britannica*, Vol. VI, *Constitution and Constitutional Law*, p. 314). As stated by Dicey in his '*Introduction to the Study of the Law of the Constitution*' (10th Ed., pp. 149-151), the Legislature in a federal constitution is a subordinate law-making body whose laws are in the nature of bye-laws within the authority conferred by the Constitution.

2064. Articles 3, 4 and 169, Paragraph 7 of the Fifth Schedule and Paragraph 21 of the Sixth Schedule emphasise an important aspect of the distinction between constitutional law and ordinary law. What is authorised to be done by these provisions would normally fall within the scope of Article 368. In order however to take out such matters from the scope of that Article and to place those matters within the ordinary legislative sphere, special provisions are made in these articles that any laws passed thereunder shall not be deemed to be an amendment of the Constitution for the purposes of Article 368.

Article 13 (1) provides:

> "*Laws inconsistent with or in derogation of the fundamental right.*—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this part shall, to the extent of such inconsistency, be void."

This Article deals with the effect of inconsistency between the provisions of Part III and the pre-Constitution laws and provides that to the extent of such inconsistency the pre-Constitution laws shall be void. Article 13(2) pursues the same strain of thought by making void post-Constitution laws to the extent of their inconsistency with the provisions of Part III. The pre-Constitution and the post-Constitution laws dealt with by the two clauses of Article 13 are in nature and character identical. They are ordinary laws as distinguished from constitutional laws.

2065. Counsel for the petitioner urged that Article 395 of the Constitution repealed only the Indian Independence Act, 1947 and the Government of India Act of 1935 and under Article 372, notwithstanding the repeal of these two enactments, all the laws in force in the territory of India immediately before the commencement of the Constitution continued in force until altered, repealed or amended. It is urged that several constitutional laws of the then Indian States were in force on the 26th January, 1950 and the object of Article 13(1) was partly to save those laws also. There is no substance in this contention. It is in the first place a proposition of doubtful authority that the Indian States had a Constitution properly so-called. But even assuming that such Constitutions were at one time in force, they would cease to be in operation as Constitutional Laws on the integration of the States with the Indian Union. Article 13(1) therefore does not include any constitutional laws.

2066. Article 13(3)(*a*) contains an inclusive definition of 'law' as including any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. It is surprising that the necessity to include amendments of the Constitution within the inclusive definition of 'law' should have been overlooked if indeed Article 13(2) was intended to take in constitutional amendments. There is high and consistent authority for the view that Constitution is the fundamental or basic law, and that it is a law of superior obligation to which the ordinary law must conform. [*Corpus Juris Secundum*, Vol. 16, pp. 22—25; Weaver—*Constitutional Law and its Administration* (1946), p. 3; Burgess—*Political Science and Constitutional Law*, Vol. 1, pp. 145-146]. Unless, therefore, constitutional law was expressly included in Article 13(3)(*a*), it would fall outside the purview of Article 13(2).

2067. In America, there is a large volume of authority that the legislatures of the various States, in initiating constitutional amendments do not exercise ordinary legislative power. This distinction is brought out clearly by saying that in relation to the federal Constitution of America, a State constitutional provision or amendment is 'law' within the meaning of the federal constitution. Again, when under Article V of the Constitution the Congress makes a proposal for amendment and the States ratify it, neither the Congress nor the States are legislating. (*Corpus Juris Secundum*, Vol. 16, pp. 48,49; Charles K. Burdick: *The Law of the American Constitution*, pp. 40-42).

2068. The fundamental distinction between constitutional law and ordinary law lies in the criterion of validity. In the case of constitutional law its validity is inherent whereas in the case of an ordinary law its validity has to be decided on the touchstone of the Constitution. With great respect, the majority view in the *Golaknath case* (supra) did not on the construction of Article 13(2), accord due importance to this essential distinction between legislative power and the constituent power. In a controlled constitution like ours, ordinary powers of legislatures do not include the power to amend the Constitution because the Body which enacts and amends the Constitution functions in its capacity as the Constituent Assembly. The Parliament performing its functions under Article 368 discharges those functions not as a Parliament but in a constituent capacity.

2069. There is a fundamental distinction between the procedure for passing ordinary laws and the procedure prescribed by Article 368 for effecting amendments to the Constitution. Under Article 368, a bill has to be initiated for the express purpose of amending the Constitution, it has to be passed by each House by not less than two-thirds members present and voting and in cases falling under the proviso, the amendment has to be ratified by the legislatures of not less than half the States. A bill initiating an ordinary law can be passed by a simple majority of the members present and voting at the sitting of each House or at a joint sitting of the two Houses. Article 368 does not provide for a joint sitting of the two Houses. The process of ratification by the States under the Proviso cannot possibly be called an ordinary legislative process for, the ratification is required to be made by "resolutions" to that effect. Ordinary bills are not passed by resolutions.

2070. The distinction between constituent power and ordinary legislative power can best be appreciated in the context of the nature of the Constitution which the court has to interpret in regard to the amending power. *In McCawley* v. *The King*[38], Lord Birkenhead used the words 'controlled' and 'uncontrolled' for bringing about the same distinction which was made between 'rigid' and 'flexible' constitutions first by Bryce and then by Dicey. In a 'controlled' or 'rigid' Constitution, a different procedure is prescribed for amending the Constitution than the procedure prescribed for making ordinary laws.

2071. In an 'uncontrolled' or 'flexible' Constitution the procedure for amending the Constitution is same as that for making ordinary laws. In such a Constitution, the distinction between constitutional laws and ordinary laws tends to become blurred because any law repugnant to the Constitution repeals the Constitution *pro tanto* [*McCawley* v. *The King* (supra)].

2072. Thus, the true ground of division, by virtue of the nature of the Constitution, is whether it is flexible or rigid. That depends upon whether the process of constitutional law-making is or is not identical with the process of ordinary law-making. A typical instance of a flexible Constitution is that of the United Kingdom. The Constitution of the former Kingdom of Italy was also flexible, so flexible indeed, that Mussolini was able profoundly to violate the spirit of the Constitution without having to denounce it. The Constitution of the United States is rigid, as it cannot be amended without the special machinery being set in motion for that purpose. "In short, then, we may say that the Constitution which cannot be bent without being broken is a rigid Constitution". (See *Modern Political Constitutions: an Introduction to the Comparative Study of Their History and Existing Form* by C. F.

---

[38] 1920 AC 691.

Strong, 1970 Reprint). The Indian Constitution, considered as a whole is a 'controlled' or 'rigid' Constitution, because, broadly, none of the articles of that Constitution can be amended otherwise than by the special procedure prescribed by Article 368. Certain provisions thereof like Article 4 read with Articles 2 and 3, Article 169, Para 7 of the Fifth Schedule and Para 21 of the Sixth Schedule confer power to amend the provisions of the Constitution by the ordinary law-making process but these amendments are expressly excepted by the respective provisions from the purview of Article 368. Schedules V and VI of the Constitution are in fact a Constitution within a Constitution.

2073. The distinction between 'flexible' and 'rigid' constitutions brings into sharp focus the true distinction between legislative and constituent power. This is the distinction which, with respect, was not given its due importance by the majority in the *Golaknath case* (supra). In a rigid Constitution, the power to make laws is the genus, of which the legislative and constituent powers are species, the differentia being the procedure for amendment. If the procedure is ordinary, the power is legislative; if it is special, the power is constituent.

2074. This discussion will show that in a 'rigid' or 'uncontrolled' Constitution—like ours—a law amending the Constitution is made in the exercise of a constituent power and partakes fully of the character of constitutional law. Laws passed under the Constitution, of which the validity is to be tested on the anvil of the Constitution are the only laws which fall within the terms of Article 13(2).

2075. The importance of this discussion consists in the injunction contained in Article 13(2) that the State shall not make any 'law' which takes away or abridges the rights conferred by Part III. An amendment of Constitution within the terms of Article 368 not being law within the meaning of Article 13(2), it cannot become void on the ground that it takes away or abridges the rights conferred by Part III.

2076. Fundamental Rights undoubtedly occupy a unique place in civilized societies, whether you call them "transcendental", "inalienable", "invoilable" or as Lieber called them, "primordial". There is no magic in these words for, the strength and importance of these rights is implicit in their very description in the Constitution as "fundamental". But the special place of importance which they occupy in the scheme of the Constitution, cannot by itself justify the conclusion that they are beyond the reach of the amending power. Article 13(2) clearly does not take the amending power and Article 368 does not except the Fundamental Rights from its scope.

2077. But they cannot be tinkered with and the Constitution has taken care to ensure that they do not become a mere 'plaything' of a special majority. Members of the Lok Sabha are elected on adult universal suffrage by people of the States. Whereas, ordinary laws can be passed by a bare majority of those present, constitutional amendments are required to be passed under Article 368 by a majority of the total membership of each House and by a majority of not less than two-thirds of the members of each House separately present and voting. In matters falling within the proviso, amendments are also required to be ratified by the Legislatures of not less than half of the States. Rajya Sabha, unlike the Lok Sabha, is a perpetual, body, which changes one-third of its membership every two years. Members of the Rajya Sabha are elected by Legislative Assemblies of the States, that is by those who are directly elected by the people themselves. The mode of election to Rajya Sabha constitutes to some extent an insurance against gusts and waves of public opinion.

2078. I will now proceed to consider an important branch of the petitioner's argument which, frankly, seemed to me at first sight plausible. On closer scrutiny, however, I am inclined to reject the argument. It is urged by the learned counsel that it is immaterial whether the amending power can be found in Article 368 or in Entry 97 of List I, because wherever that power lies, its exercise is subject to inherent and implied limitations.

2079. The argument takes this form: Constitutions must of necessity be general rather than detailed and prolix, and implication must therefore play an important part in constitutional construction. Implied limitations are those which are implicit in the scheme of the Constitution while inherent limitations are those which inhere in an authority from its very nature, character and composition. Implied limitations arise from the circumstances and historical events which led to the enactment of our Constitution, which represents the solemn balance of rights between citizens from various States of India and between various sections of the people. Most of the essential features of the Constitution are basic Human Rights, sometimes described as "Natural Rights", which correspond to the rights enumerated in the "Universal Declaration of Human Rights", to which India is a signatory. The ultimate sovereignty resides in the people and the power to alter or destroy the essential features of a Constitution is an attribute of that sovereignty. In Article 368, the people are not associated at all with the amending process. The Constitution gives the power of amendment to the Parliament which is only a creature of the Constitution. If the Parliament has the power to destroy the essential features, it would cease to be a creature of the Constitution, the Constitution would cease to be supreme and the Parliament would become supreme over the Constitution. The power given by the Constitution cannot be construed as authorising the destruction of other powers conferred by the same instrument. If there are no inherent limitations on the amending power of the Parliament, that power could be used to destroy the judicial power, the executive power and even the ordinary legislative power of the Parliament and the State legislatures. The Preamble to our Constitution which is most meaningful and evocative, is beyond the reach of the amending power and therefore no amendments can be introduced into the Constitution which are inconsistent with the Preamble. The Preamble walks before the Constitution and is its identity card.

2080. Counsel has made an alternative submission that assuming for purposes of argument that the power of amendment is wide enough to reach the Fundamental Rights, it cannot be exercised so as to damage the core of those rights or so as to damage or destroy the essential features and the fundamental principles of the Constitution. Counsel finally urges that the theory of implied and inherent limitations has been accepted by the highest courts of countries like U.S.A., Canada, Australia and Ireland. The theory is also said to have been recognized by this Court, the Federal Court and the Privy Council.

2081. In answer to these contentions, it was urged on behalf of the respondents that there is no scope for reading implied or inherent limitations on the amending power, that great uncertainty would arise in regard to the validity of constitutional amendments if such limitations were read on the amending power, that the Preamble is a part of the Constitution and can be amended by Parliament, that there is in our Constitution no recognition of basic human or natural rights and that the consensus of world opinion is against the recognition of inherent limitations on the amending power.

2082. Before dealing with these rival contentions, I may indicate how the argument of inherent limitations was dealt with in the *Golaknath case* (supra). Subba Rao, C. J., who delivered the leading majority judgment said that there was considerable force in the argument but it was unnecessary to decide it (page 805). According to Hidayatullah, J., "the whole Constitution is open to amendment. Only two dozen articles are outside the reach of Article 368. That too because the Constitution has made them fundamental". (page 878). Wanchoo, J., who delivered the leading minority judgment rejected the argument by observing: "The power to amend being a constituent power cannot in our opinion..........be held subject to any implied limitations thereon on the ground that certain basic features of the Constitution cannot be amended". (page 836). Bachawat, J., observed that it was unnecessary to decide the question, as it was sufficient for the disposal of the case to say that Fundamental Rights were within the reach of the amending power (page 906). Ramaswami, J., considered and rejected the argument by observing that there was no room for an implication in the construction of Article 368 and it was unlikely that if certain basic features were intended to be unamendable, the Constitution-makers would not have expressly said so in Article 368 (page 933).

2083. It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man. There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers. Article 13(2) speaks of rights "conferred" by Part III and enjoins the States not to make laws inconsistent therewith. Article 32 of the Constitution says that the right to move the Supreme Court for the enforcement of rights 'conferred' by Part III is guaranteed. Before the Fundamental Rights were thus conferred by the Constitution, there is no tangible evidence that these rights belonged to the Indian people. Article 19 of the Constitution restricts the grant of the seven freedoms to the citizens of India. Non-citizens were denied those rights because the conferment of some of the rights on the Indian citizens was not in recognition of the pre-existing natural rights. Article 33 confers upon the Parliament the power to determine to what extent the rights conferred by Part III should be restricted or abrogated in their application to the members of the Armed Forces. Article 359(1) empowers the President to suspend the rights "conferred" by Part III during the proclamation of an emergency. Articles 25 and 26 by their opening words show that the right to freedom of religion is not a natural right but is subject to the paramount interest of society and that there is no part of that right, however important, which cannot and in many cases has not been regulated in civilised societies. Denial to a section to the community, the right of entry to a place of worship, may be a part of religion but such denials, it is well-known, have been abrogated by the Constitution, per Venkatarama Aiyar, *J.*[39]; (see also *Bourne* v. *Keane,*[39a] per Lord Birkenhead, L. C). Thus, in India, citizens and non-citizens possess and are entitled to exercise certain rights of high significance for the sole reason that they are conferred upon them by the Constitution.

---

[39] *Sri Venkataramana Devaru* v. *State of Mysore,* 1958 SCR 895 at 919: AIR 1958 SC 255: 1958 SCJ 382.

[39a] 1919 AC 815 at 861.

2084. The 'natural right' theory stands, by and large, repudiated today. The notion that societies and governments find their sanction on a supposed contract between independent individuals and that such a contract is the sole source of political obligation is now regarded as untenable. Calhoun and his followers have discarded this doctrine, while theorists like Story have modified it extensively. The belief is now widely held that natural rights have no other than political value. According to Burgess, "there never was, and there never can be any liberty upon this earth among human beings, outside of State organisation". According to Willoughby, natural rights do not even have a moral value in the supposed "state of nature"; they would really be equivalent to force and hence have no political significance. Thus, Natural Right thinkers had once "discovered the lost title-deeds of the human race" but it would appear that the deeds are lost once over again, perhaps never to be resurrected.

2085. The argument in regard to the Preamble is that it may be a part of the Constitution but is not a provision of the Constitution and therefore, you cannot amend the Constitution so as to destroy the Preamble. The Preamble records like a sun-beam certain glowing thoughts and concepts of history and the argument is that in its very nature it is unamendable because no present or future, however mighty, can assume the power to amend the true facts of past history. Counsel relies for a part of this submission on the decision in *Berubari case*.[40] Our attention was also drawn to certain passages from the chapter on "Preamble" in "*Commentaries on the Constitution of the United States*" by Joseph Story.

2086. I find it impossible to accept the contention that the Preamble is not a provision of the Constitution. The record of the Constituent Assembly leaves no scope for this contention. It is transparent from the proceedings that the Preamble was put to vote and was actually voted upon to form a part of the Constitution. (*Constituent Assembly Debates*, Vol. X, pp. 429, 456). As a part and provision of the Constitution, the Preamble came into force on January 26, 1950. The view is widely accepted that the Preamble is a part of the enactment. (Craies on *Statute Law*, 7th Ed., page 201; *Halsbury*, Vol. 36, 3rd Ed., page 370).

2087. In considering the petitioner's argument on inherent limitations, it is well to bear in mind some of the basic principles of interpretation. Absence of an express prohibition still leaves scope for the argument that there are implied or inherent limitations on a power, but absence of an express prohibition is highly relevant for inferring that there is no implied prohibition. This is clear from the decision of the Privy Council in *The Queen* v. *Burah*.[41] This decision was followed by this Court in *State of Bombay* v. *Narotham Das Jetha Bai*[42] and in *Sardar Inder Singh* v. *State of Rajasthan*.[43] In saying this, I am not unmindful of the fact that *Burah's case* (supra) and the two cases which followed it, bear primarily on conditional legislation.

2088. Another principle of interpretation is that it is not open to the courts to declare an Act void on the ground that it is opposed to a 'spirit' supposed to pervade the Constitution, but not manifested in words. As observed by Kania, C. J. in *Gopalan's case*[44] a wide assumption of power of construction is apt to place in the hands of judiciary too great and to indefinite a power, either for its own security or the protection of private rights. The argument of 'spirit' is always attractive and quite some eloquence can be infused into it. But one should remember what S.R. Das, J., said in *Keshav Madhav Menon's case*[45] that one must gather the spirit from the words or the language used in the Constitution. I have held that the language of Article 368 is clear and explicit. In that view, it must be given its full effect even if mischievous consequences are likely to ensue; for, judges are not concerned with the policy of law-making and "you cannot pass a covert censure against the legislature". (*Vacher & Sons, Limited* v. *London Society of Compositors*).[46] The importance of the circumstance that the language of Article 368 admits of no doubt or ambiguity is that such a language leaves no scope for implications, unless in the context of the entire instrument in which it occurs, such implications become compulsive. I am tempted to say that 'context' does not merely mean the position of a word to be construed, in the collection of words in which it appears, but it also means the context of the times in which a fundamental instrument falls to be construed.

---

[40] (1960) 3 SCR 250, 282: AIR 1960 SC 845: 1960 SCJ 933.

[41] 5 IA 178, 195.

[42] 1951 SCR 51, 81: AIR 1951 SC 89: 1941 SCJ 103.

[43] 1957 SCR 605, 616-17: AIR 1957 SC 510: 1957 SCJ 376.

[44] 1950 SCR 88, 121: AIR 1950 SC 27: 1950 SCJ 174: 51 CrLJ 1383.

2089. An important rule of interpretation which, I think, has a direct bearing on the submissions of the petitioner on inherent limitations is that if the text is explicit, it is conclusive alike in what it directs and what it forbids. The consequences of a particular construction, if the text be explicit, can have no impact on the construction of a constitutional provision (*Attorney-General, Ontario* v. *Attorney-General, Canada.*[47] As observed by Chief Justice Marshall in *Providence Bank* v. *Alpheus Billings.*[48] a power may be capable of being abused but the Constitution is not intended to furnish a corrective for every abuse of power which may be committed by the Government. I see no warrant for the assumption that the Parliament will be disposed to put a perverse construction on the powers plainly conferred on it by the Constitution. And talking of abuse of powers, is there not the widest scope for doing so under several provisions of the Constitution? The powers of war and peace, the powers of finance and the powers of preventive detention, are capable of the widest abuse and yet the Founding Fathers did confer those powers on the Parliament. When I look at a provision like the one contained in Article 22 of the Constitution, I feel a revolt rising within myself, but then personal predilections are out of place in the construction of a constitutional provision. Clause (7) of Article 22 permits the Parliament to enact a law under which a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board. While enacting certain laws of Preventive Detention, the Government has shown some grace in specifying the outer limits, however, uncertain, of the period of detention though, so it seems, it is under no obligation to do so. Thus, even when the original Constitution was passed, powers capable of the gravest abuse were conferred on the Parliament, which as the petitioner's counsel says, is but a creature of the Constitution. In assessing the argument that the gravity of consequences is relevant on the interpretation of a constitutional provision, I am reminded of the powerful dissent of Justice Holmes in *Lochner* v. *New York,*[49] regarding a labour statute. The test according to the learned Judge was not whether he considered the law to be reasonable but whether other reasonable persons considered it unreasonable. In *Bank of Toronto* v. *Lambe,*[50] Lord Hobhouse observed: "People who

---

[45] 1951 SCR 228, 231: AIR 1951 SC 128: 1951 SCJ 182: 1951 CrLJ 860.

[46] 1913 (AC), 107 at 112, 117, 121.

[47] 1892 (AC) 571.

[48] L. Ed. 939, 957: 4 Pat 514 (1830).

[49] 49 L. Ed. 937.

[50] 1887 (AC) 575, 586.

SCC Online

are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes". Trust in the elected representatives is the corner-stone of a democracy. When that trust fails, everything fails. As observed by Justice Learned Hand in *"the Spirit of Liberty"*: "I often wonder, whether we do not rest our hopes too much upon Constitution, upon laws and upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it; no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save."

2090. Established text-books on Interpretation also take the view that "where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature".[51]

2091. It is thus clear that apart from constitutional limitations, no law can be struck down on the ground that it is unreasonable or unjust. That is the view which was taken by this Court in the *State of Bihar* v. *Kameshwar Singh*.[52] Mahajan, J., described the Bihar Land Reforms Act, which was under consideration in that case, as repugnant to the sense of justice of the court. In fact, the learned Judge says in his judgment that it was not seriously disputed by the Attorney-General, that the law was highly unjust and inequitous and the compensation provided therein in some cases was purely illusory. The Court, however, found itself powerless to rectify an "injustice" perpetrated by the Constitution itself. No provision incorporated in a Constitution at the time of its original enactment can ever be struck down as unconstitutional. The same test must apply to what becomes a part of that Constitution by a subsequent amendment, provided that the conditions on which alone such amendments can be made are strictly complied with. Amendments, in this sense, pulsate with the vitality of the Constitution itself.

2092. The true justification of this principle is, as stated by Subba Rao, J., in the *Collector of Customs, Baroda* v. *Digvijaysinhji Spinning & Weaving Mills Ltd.*,[53] that a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution. In fact, amendments which were made by the Constitution (First Amendment) Act, 1951 to Articles 15 and 19 were never assailed and have been conceded before us to have been properly made. It was urged by the learned counsel that the substitution of new clause (2) in Article 19 did not abrogate the Fundamental Rights, but on the other hand enabled the citizens at large to enjoy their fundamental freedoms more fully. This, I think, is the crux of the matter. What counsel concedes in regard to Article 19(2) as substituted by the First Amendment Act can be said to be equally true in regard to the amendments now under challenge. Their true object and purpose is to confer upon the community at large the blessings of liberty. The argument is that the Parliament may amend the provisions of Part III, but not so as to damage or destroy the core of those rights or the core of the essential principles of the Constitution. I see formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. I consider the two to be inseparable.

---

[51] Craies on *"Statue Law"*, 6th Ed., p. 66.

[52] 1952 SCR 889, 936-937: AIR 1952 SC 252: 1952 SCJ 354.

[53] (1962) 1 SCR 896, 819: AIR 1961 SC 1549: (1963) 1 SCJ 278: 1961 (2) CrLJ 720.

2093. Counsel painted a lurid picture of the consequences which will ensue if a wide and untrammelled power is conceded to the Parliament to amend the Constitution. These consequences do not scare me. It is true that our confidence in the men of our choice cannot completely silence our fears for the safety of our rights. But in a democratic polity, people have the right to decide what they want and they can only express their will through their elected representatives in the hope and belief that the trust will not be abused. Trustees are not unknown to have committed breaches of trust but no one for that reason has abolished the institution of Trusts. Can we adopt a presidential system of government in place of the parliamentary system? Can we become a monarchial or theocratic State? Shall we permit the Parliament to first destroy the essential features of the Constitution and then amend the amending power itself so as to provide that in future no amendment shall be made except by a 99 per cent. majority? Can the Parliament extend its term from 5 to 50 years and create a legislative monopoly in its favour? These are the questions which counsel has asked. My answer is simple, History records that in times of stress, such extreme steps have been taken both by the people and by the Parliament. In 1640, when England was invaded by Scots, Charles I was obliged to recall Parliament to raise money for the war. The 'Short' Parliament insisted on airing its grievances before voting the money and was dismissed. Charles had to summon a new Parliament immediately, and this 'Long' Parliament lasting until 1960, set out to make personal government by a monarch impossible. The true sanction against such political crimes lies in the hearts and minds of men. It is there that the liberty is insured. I therefore say to myself not in a mood of desparation, not in a mood of helplessness, not cynically but in the true spirit of a democrat: If the people acting through the Parliament want to put the Crown of a King on a head they like, or if you please, on a head they dislike, (for uneasy lies the head that wears a Crown), let them have that liberty. If and when they realise the disaster brought by them upon themselves, they will snatch the Crown and scatter its jewels to the winds. As I say this, I am reminded of a famous saying of Justice Holmes: "About seventy-five years ago, I learnt that I was not God. And so, when the people……want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not: 'God-dammit, let 'em do it!' "

2094. No name is mentioned with greater honour in the history of American democracy than that of Thomas Jefferson. He was the central figure in the early development of American democracy, and on his death he was politically canonized. Jefferson said in regard to the necessity of a wide amending power that "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it". "If one generation could bind another, the dead and not the living would rule. Since conditions change and men change, there must be opportunity for corresponding change in political institutions, and also for a renewal of the principle of government by consent of the governed". According to President Wilson, "a Constitution must of necessity be a vehicle of life; that its substance is the thought and habit of the nation and as such it must grow and develop as the life of the nation changes".

2095. In support of his argument on implied limitations learned counsel for the petitioner drew our attention to certain decisions on the theory of immunity of instrumentalities: The means and instrumentalities of the State Governments should be left free and unimpaired. Our Court rejected this theory in *State of West Bengal* v. *Union of India*.[54] Sinha, C. J., observed that the argument presented before the Court was: "a resucitation of the new exploded doctrine of the immunity of instrumentalities which originating from the observations of Marshall, C. J., in *McCulloch* v. *Maryland* (supra) has been decisively rejected by the Privy Council .. ..and has been practically given up even in the United States". The doctrine originally arose out of the supposed existence of an implied prohibition that the Federal and State Governments being sovereign and independent must each be free from the control of the other. Dr. Wynes observes in his book: "*Legislative, Executive and Judicial Powers in Australia*, (4th Edition)" that the doctrine has undergone considerable change in the United States and its progressive retreat is traced by Dixon, J., in the *Essendon Corporation case*.[55] In that case, after tracing the history of the doctrine since its enunciation by Chief Justice Marshall, Dixon J., says: "I think that the abandonment by the Supreme Court of the United States of the old doctrine may be fairly said to be now complete".

2095-A. A large number of cases bearing on inherent or implied limitations were cited to us from U. S. A., Canada, Australia, South Africa and Ceylon. Having considered those cases carefully, I find it difficult to say that the theory of implied or inherent limitations has received a wide recognition. In *McCawley* v. *R.*,[56] the dissenting judgment of Issacs and Rich, JJ., in the Australian High Court was upheld by the Privy Council, except in regard to a matter which is here not relevant. The judgment of the two learned Judges which received high praise from the Privy Council (p. 112 of *Commonwealth Law Reports*), shows that implications in limitation of power ought not to be imported from general concepts but only from express or necessarily implied limitations. It also shows that in granting powers to colonial legislatures, the British Parliament, as far back as 1865, refused to place on such powers limitations of a vogue character. The decision of the Privy Council in *Bribery Commissioner* v. *Ranasinghe*,[56a] was discussed before us in great details by both the sides. The matter arose under the Constitution of Ceylon, of which the material provisions bear a near parallel to our Constitution, a fact which, with respect, was not noticed in the judgment of the leading majority in the *Golaknath case* (supra). It was not argued by the respondents in *Ranasinghe's case* (supra) that any provision of the Ceylonese Constitution was unamendable. It is also necessary to remember that the appeal did not raise any question regarding the religious rights protected by Section 29(2) and (3) of the Ceylonese Constitution. It is clear that counsel for the respondents there stated (p. 187), that there was no limitation on the power of amendment except the procedure prescribed by Section 29 (4), and that even that limitation could be removed by an amendment complying with Section 29(4). The Privy Council affirmed this position (page 198) and took the widest view of the amending power. A narrower view was in fact not argued.

2096. From out of the decisions of the American Supreme Court, it would be sufficient to notice three: *Rhode Island* v. *Palmer*[57]; *U. S.* v. *Sprague*[58] and *Schneiderman* v. *U. S. A.*[59]

---

[54] (1964) 1 SCR 371, 407: AIR 1963 SC 1241.
[55] (1947) 74 CLR 1, 19.
[56] (1920) AC 691; 28 CLR 106.
[56a] 1955 AC 172.
[57] 64 L. Ed. 946.
[58] 75 L. Ed. 640.
[59] 87 L. Ed. 1796.

2097. In the *Rhode Island case* (supra) the leading majority judgment gave no reasons but only a summary statement of its conclusions. The learned Advocate-General of Maharashtra has, however, supplied to us the full briefs filed by the various counsel therein. The briefs show that the 18th Amendment regarding "Prohibition of Intoxicating Liquors" (which was repealed subsequently by the 21st Amendment) was challenged on the ground, *inter alia*, that there were implied and inherent limitations on the power of amendment under Article V of the American Constitution. These arguments were not accepted by the Supreme Court, as is implicit in its decision. The court upheld the Amendment.

2098. We were supplied with a copy of the judgment of the District Court of New Jersey in *Sprague's case* (supra). The District Court declared the 18th Amendment void on the ground that there were inherent limitations on the amending power in that, the power had to conform to "theories of political science, sociology, economics, etc." The judgment of the Supreme Court shows that not even an attempt was made to support the judgment of the District Court on the ground of inherent limitations. The appeal was fought and lost by Sprague on entirely different grounds, namely: whether 'amendment' means 'improvement'; whether the X Amendment had an impact on Article V of the U. S. Constitution and whether the alternative of ratification by Convention or Legislatures showed that the method of Convention was essential for valid ratification when the amendment affected the rights of the people. Obviously the Supreme Court saw no merit in the theoretical limitations which the District Court had accepted for, in a matter of such grave importance, it would not have reversed the District Court judgment if it could be upheld on the ground on which it was founded.

2099. In *Schneiderman's case* (supra) action was taken by the Government to cancel the appellant's naturalisation certificate on the ground that at the time of applying for naturalisation, he was and still continued to be a communist and thereby he had misrepresented that he was "attached to the principles of the Constitution of the United States".

2100. Schneiderman won his appeal in the Supreme Court, the main foundation of the judgment being that the fundamental principles of Constitution were open to amendment by a lawful process.

2101. Leading Constitutional writers have taken the view that the American Supreme Court has not ever accepted the argument that there are implied or inherent limitations on the amending power contained in Article V. Edward S. Corwin, who was invited by the Legislative Reference Service, Library of Congress, U. S. A., to write on the American Constitution, says after considering the challenges made to the 18th and 19th Amendments on the ground of inherent limitations: "brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.[60] According to Thomas M. Cooley, there is no limit to the power of amendment beyond the one contained in Article V, that no State shall be deprived of its equal suffrage in the Senate without its consent. The author says that this, at any rate, is the result of the decision of the so-called *National Prohibition cases* (supra) which include the *Rhode Island case* (supra). The decision, according to Cooley, totally negatived the contention that: "An amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government, nor relinquish to the State those which already have been granted to it.[61] According to Henry Rottschaefer, it was contended on several occasions that the power of amending the Federal Constitution was subject to express or implied limitations, "but the Supreme Court has thus far rejected every such claim."[62]

---

[60] *Constitution of the United States of America* prepared by Edward S. Corwin, 1953, p. 712.

2102. In regard to the Canadian cases, it would, I think, be enough to say that none of the cases cited by the petitioner concerns the exercise of the power to amend the Constitution. They are cases on the legislative competence of the provincial legislatures in regard to individual freedoms or in regard to criminal matters. The issue in most of these cases was whether the provincial legislature had transgressed on the Dominion field in exercise of its powers under Section 92 of the British North America Act, 1867. The Canadian Bill of Rights, 1960, makes the rights incorporated in the Bill defeasible by an express declaration that an Act of Parliament shall operate notwithstanding the Bill of Rights. At least six different views have been propounded in Canada on the fundamental importance of these rights. According to Schmeiser, the Supreme Court of Canada has not given judicial approval to any of these views. "It should also be noted that the fundamental problem is not whether Parliament or the Legislatures may give us our basic freedoms but rather which one may interfere with them or take them away.[63] I do not think, therefore, that any useful purpose will be served by spending time on *Hess's case* (4 DLR 199) *Saumur's case* (4 DLR 641); *Switzman's case* 7 DLR (2nd) 337; or *Chabot's case,* 12 DLR (2nd) 796, which were cited before us.

2103. The view that there are implied limitations found from Sections 17 and 50 of the British North America Act was invoked by Duff, C.J., in the *Alberta Press case,*[64] and by three learned Judges in the *Saumur case* (supra). It is, however, important that while denying legislative competence to the province of Alberta, Duff, C.J., was willing to grant the jurisdiction to the Parliament to legislate for the protection of this right.

2104. The petitioner has replied strongly upon the decision in *Attorney-General of Nova Scotia* v. *Attorney-General of Canada,*[65] but the true ratio of that decision is that neither the federal nor the provincial bodies possess any portion of the powers respectively vested in the other and they cannot receive those powers by delegation. The decision in *Chabot* v. *School Commissioners,*[66] is of the Quebec Court of Appeal, in which Casey, J., observed that the religious rights find their existence in the very nature of man; they cannot be taken away. This view has not been shared by any judge of the Supreme Court and would appear to be in conflict with the decision in *Henry Briks & Sons* v. *Montreal.*[67]

2105. I do not think that any useful purpose will be served by discussing the large number of decisions of other foreign courts cited before us. As it is often said, a Constitution is a living organism and there can be no doubt that a Constitution is evolved to suit the history and genius of the nation. Therefore, I will only make a brief reference to a few important decisions.

---

[61] *The General Principles of Constitutional Law in the U. S. A.,* by Thomas M. Cooley, 4th Edn., pp. 46-47.

[62] *Handbook of American Constitutional Law* by Henry Rottschaefer, pp. 8-10.

[63] *Civil Liberties in Canada* by Schmiser, p. 13.

[64] 1938 SCR 100, 146 (Canada).

[65] 1951 SCR 31 (Canada).

[66] 1947 12 DLR (No. 2), 796.

[67] 1955 SCR 799 (Canada).

SCC Online

2106. *Ryan's case*[68] created a near sensation and was thought to cover the important points arising before us. The High Court of Ireland upheld the amendment made by the Oireachtes, by deleting Article 47 of the Constitution which contained the provision for referendum, and which also incorporated an amendment in Article 50. This latter article conferred power on the Oireachtas to make amendments to the Constitution within the terms of the Scheduled Treaty. An amendment made after the expiration of a period of 8 years from the promulgation of the Constitution was required to be submitted to a referendum of the people. The period of 8 years was enlarged by the amendment into 16 years. The High Court of Ireland upheld the amendment and so did the Supreme Court, by a majority of 2 to 1. Kennedy, C. J., delivered a dissenting judgment striking down the amendment on the ground that there were implied limitations on the power of amendment. An important point of distinction between our Constitution and the Irish Constitution is that whereas Article 50 did not contain any power to amend that article itself, Article 368 of our Constitution confers an express power by clause (*e*) of the Proviso to amend that article. The reasoning of the learned Chief Justice therefore loses relevance in the present case. I might mention that in *Moore* v. *Attorney-General for the Irish State*[69] in which a Constitutional amendment made in 1933 was challenged, it was conceded before the Privy Council that the amendment which was under fire in *Ryan's case* (supra) was validly made. The Privy Council added to the concession the weight of its own opinion by saying that the concession was made "rightly".

2107. Several Australian decisions were relied upon by the petitioner but I will refer to the one which was cited by the petitioner's counsel during the course of his reply: *Taylor* v. *Attorney-General of Queensland*.[70] The observations of Isaacs, J., on which the learned counsel relies seem to me to have been made in the context of the provisions of the Colonial Laws Validity Act. The real meaning of those observations is that when power is granted to a colonial legislature to alter the Constitution, it must be assumed that the power did not comprehend the right to eliminate the Crown as a part of the colonial legislature. It may be mentioned that well-known Constitutional writers[71] have expressed the view that all the provisions of the Australian Constitution; including Article 128 itself which confers power to amend the Constitution, are within the power of amendment. This view has been taken even though Article 128 does not confer express power to amend that article itself.

2108. While winding up this discussion of authorities, it is necessary to refer to the decision of the Privy Council in *Liyanage* v. *The Queen*[72] in which it was held that the powers of the Ceylon legislature could not be cut down by reference to vague and uncertain expressions like 'fundamental principles of British Law'.

2109. It must follow from what precedes that *The Constitution (Twenty-fourth Amendment) Act, 1971* is valid. I have taken the view that constitutional amendments made under Article 368 fell outside the purview of Article 13(2). Section 2 of the 24the Amendment ;Act reiterates this position by adding a new clause (4) in Article 13: "(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368". I have also taken the view that the old Article 368 not only prescribed the procedure for amendment of the Constitution but conferred the power of amendment. That position is made clear by Section 3 of the 24th Amendment which substitutes by clause (*a*) a fully expressive marginal heading to Article 368. I have held that the power of amendment conferred by Article 368 was wide and untrammelled. Further, that Constitutional amendments are made in the exercise of constituent power and not in the exercise of ordinary law-making power. That position is reiterated by clause (*b*) of Section 3. Clause (*c*) of Section 3 makes it obligatory for the President to give his assent to the bill for a constitutional amendment. Rightly no arguments have been addressed on this innovation. Finally, clause (*d*) of Section 3 of the 24th Amendment excludes the application of Article 13 to an Amendment made under Article 368. As indicated in this judgment that was the correct interpretation of Articles 13 and 368.

---

[68] 1935 Irish Reports 170.

[69] 1935 AC 484.

[70] 23 CLR 457.

[71] A. P. Canaway, K. C.: "*The Safety Valve of the Commonwealth Constitution*", Australian Law Journal, Vol. 12, (1938-39), p. 108 at 109; W. Anstey Wynes: "*Legislative, Executive and Judicial Powers in Australia*", 4th Edn., Chapter XII, p. 507.

[72] (1967) 1 AC 259.

2110. The Constitution (Twenty-fourth Amendment) Act, 1971, thus, merely clarifies what was the true law and must therefore be held valid.

The Twenty-Fifth Amendment

2111. The Constitution (Twenty-fifth Amendment) Act, 1971, which came into force on April 20, 1972 consists of two effective sections: Sections 2 and 3. Section 2(*a*) substitutes a new clause (2) for the original clause (2) of Article 31 of the Constitution. Under the original Article 31(2), no property could be acquired for a public purpose under any law unless it provided for compensation for the property taken possession of or acquired and either fixed the amount of the compensation, or specified the principles on which, and the manner in which, the compensation was to be determined and given. In the *State of West Bangal* v. *Bela Benerjee*,[73] a unanimous Bench presided over by Patanjali Sastri, C. J., held that the principles of compensation must ensure the payment of a just equivalent of what the owner was deprived of. The Constitution (Fourth Amendment) Act was passed on April 27, 1955 in order to meet that decision. By the Fourth Amendment, an addition was made to Article 31(2) providing that "……no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate". The effect of this amendment was considered by this Court in *P. Vajravelu Mudaliar* v. *Deputy Collector*.[74] The Madras Legislature had passed an Act providing for the acquisition of lands for housing schemes and had laid down principles for fixing compensation different from those prescribed in the Land Acquisition Act, 1894. Delivering the judgment of the Court, Subba Rao, J., held that the fact that Parliament used the same expressions, 'compensation' and 'principles' as were found in Article 31 before its Amendment, was a clear indication that it accepted meaning given by this Court to those expressions in *Bela Banerjee's case* (supra). The Legislature, therefore, had to provide for a just equivalent of what the owner was deprived of or specify the principles for the purpose of ascertaining the just equivalent. The new clause added by the Fourth Amendment, excluding the jurisdiction of the Court to consider the adequacy of compensation, was interpreted to mean that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' could be questioned by the court on the ground of the inadequacy of the compensation

---

[73] 1954 SCR 558: AIR 1954 SC 170: 1954 SCJ 95.

[74] (1965) 1 SCR 614: AIR 1965 SC 1017: (1964)2 SCJ 703.

SCC Online

fixed or arrived at by the working of the principles. By applying this test, the Court upheld the principles of compensation fixed under the Madras Act as not contravening Article 31(2). The Act however, was struck down under Article 14 on the ground that full compensation had still to be paid under a parallel law: The Land Acquisition Act.

2112. In *Union of India* v. *Metal Corporation*[75], a Bench of two Judges consisting of Subba Rao, C. J., and Shelat, J., held that the law of acquisition in order to justify itself had to provide for the payment of 'just equivalent' or lay down principles which will lead to that result. It is only if the principles laid down are relevant to the fixation of compensation and are not arbitrary that the adequacy of the resultant product could not be questioned in a court of law. It is evident that this decision marked a departure from the judgment in *Vajravelu's case* (supra).

2113. In the *State of Gujarat* v. *Shantilal Mangaldas*[76] Shah, J., speaking for himself and three other learned Judges expressed his disagreement with the observations of Subba Rao, C. J., in the *Metal Corporation's case* (supra) and expressly overruled that decision. It was held that if the quantum of compensation was not liable to be challenged on the ground that it was not a just equivalent, the principles specified for determination of compensation could also not be challenged on the plea that the compensation determined by the application of those principles was not a just equivalent. The learned judge observed that this did not, however, mean that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitrariness, and permit a device to defeat the Constitutional guarantee. Principles could, therefore, be challenged on the ground that they were irrelevant to the determination of compensation, but not on the ground that what was awarded as a result of the application of those principles was not just or fair compensation.

2114. In *R. C. Cooper* v. *Union of India*[77], (the *Bank Nationalisation case*) (supra) the judgment in *Shantilal Mangaldas's case* (supra) was in substance overruled by a Bench of 11 Judges by a majority of 10 to 1. The majority referred to the meaning of compensation as an equivalent of the property expropriated. It was held that if the statute in providing for compensation devised a scheme for payment of compensation in the form of bonds and the present value of what was determined to be given was thereby substantially reduced, the statute impaired the guarantee of compensation.

2115. This chain of decisions on the construction of Article 31(2) introduced uncertainty in law and defeated to a large extent the clearly expressed intention of the amended Article 31(2) that a law providing for compensation shall not be called in question in any court on the ground that the compensation provided by it was not adequate. Shah, J.. in *Shantilal Mangaldas's case*[78] had observed with reference to the decision in *Bela Banerjee's case* (supra) and *Subodh Gopal's case*[79] that those decisions had raised more problems than they solved and that they placed serious obstacles in giving effect to the Directive Principles of State Policy incorporated in Article 39. Subba Rao, J., had also observed in *Vajravelu's case*[80] that if the intention of the Parliament was

---

75. (1967)1 SCR 255: AIR 1967 SC 637: (1967)1 SCJ 182: 37 Com Cas 1.
76. (1969)3 SCR 341: (1969)1 SCC 509.
77. (1970)3 SCR 530: (1970)1 SCC 248.
78. (1969)3 SCR 341 at 362, 363: (1969)1 SCC 509.
79. 1954 SCR 587: AIR 1954 SC 92: 1954 SCJ 127.
80. (1965)1 SCR 614, 626: AIR 1965 SC 1017: (1964)2 SCJ 703.

to enable the legislature to make a law without providing for compensation it would have used other expressions like, 'price', 'consideration', etc. This is what the Parliament has now done partially by substituting the word 'amount' for the word 'compensation' in the new Article 31(2).

2116. The provision in the newly added clause 2-B of Article 31 that nothing in Article 19(1)(*f*) shall affect any law referred to in Article 31(2) has been obviously incorporated because the *Bank Nationalisation case* (supra) overruled a long line of authorities which had consistently taken the view that Article 19(1)(*f*) and Article 31(2) were mutually exclusive so far as acquisition and requisition were concerned. [*See* for example *Gopalan's case*,[80a] *Chiranjit Lal Choudhury's case*,[80b] *Sitabati Devi's case*,[80c] *Shantilal Mangaldas' case*,[80d] and *H. N. Rao's case*.[80e]]

2117. Learned counsel appearing for the petitioner mounted a severe attack on the Twenty-fifth Amendment, particularly on the provisions of Article 31-C. He contends that Article 31-C subverts seven essential features of the Constitution, and destroys ten Fundamental Rights, which are vital for the survival of democracy, the rule of law and the integrity and unity of the Republic. Seven of these fundamental rights, according to the counsel are unconnected with property rights. The argument continues that Article 31-C destroys the supremacy of the Constitution by giving a blank charter to Parliament and to all the State Legislatures to defy and ignore the Constitution; it subordinates the Fundamental Rights to Directive Principles of State Policy, destroying thereby one of the foundations of the Constitutions; it virtually abrogates the "manner and form" of amendment laid down in Article 368 by empowering the State Legislatures and the Parliament to take away important Fundamental Rights by an ordinary law passed by a simple majority; that it destroys by conclusiveness of the declaration the salient safeguard of judicial review and the right of enforcement of Fundamental Rights; and that, it enables the Legislatures, under the guise of giving effect to the Directive Principles, to take steps calculated to affect the position of religious, regional, linguistic, cultural and other minorities. Counsel complains that the article abrogates not only the most cherished rights to personal liberty and freedom of speech but it also abrogates the right to equality before the law, which is the basic principle of Republicanism. By enacting Article 31-C the Parliament has resorted to the strange procedure of maintaining the Fundamental Righs unamended, but authorising the enactment of laws which are void as offending those rights, by validating them by a legal fiction that they shall not be deemed to be void. Today, Article 31 permits the enactment of laws in abrogation of Articles 14, 19 and 31, but what guarantee is there that tomorrow all the precious freedoms will not be excepted from the range of laws passed under Article 31-C? Learned Counsel wound up his massive criticism against Article 31-C by saying that the article is a monstrous outrage on the Constitution and its whole object and purpose is to legalise despotism.

2118. Having given a most anxious consideration to these arguments, I have come to the conclusion that though Article 31-C is pregnant with possible mischief, it cannot, by the application of any of the well-recognised judicial tests be declared unconstitutional.

[80a] 1950 SCR 88: AIR 1950 SC 27: 1950 SCJ 174: 51 Cri LJ 1383.

[80b] 1950 SCR 859 at 919: AIR 1950 SC 41: 1951 SCJ 29.

[80c] (1967) 2 SCR 949.

[80d] (1969) 3 SCR 341: (1969) 1 SCC 509.

[80e] (1969) 2 SCR 392 (*sic*).

2119. For a proper understanding of the provisions of Article 31-C, one must in the first place appreciate the full meaning and significance of Article 39(*b*) and (*c*) of the Constitution. Article 39 appears in Part IV of the Constitution, which lays down the Directive Principles of State Policy. The idea of Directive Principles was taken from Eire, which in turn had borrowed it from the Constitution of Republican Spain. These preceding examples, as said by Sir Ivor Jennings,[81] are significant because they came from countries whose peoples are predominantly Roman Catholic, "and the Roman Catholics are provided by their Church not only with a faith but also with a philosophy". On matters of faith and philosopy—social or political—there always is a wide divergence of views and in fact Republican Spain witnessed a war on the heels of the enactment of its Constitution and in Eire, de Valera was openly accused of smuggling into the Constitution the pet policies of his own party. Articles 38 and 39 of our Constitution are principally based on Article 45 of the Constitution of Eire, which derives its authority from the Papal Bulls. Article 39 provides by clause (*b*) that the State shall, in particular, direct its policy towards securing—"that the ownership and control of the material resources of the community are so distributed as best to subserve the common good". Clause (*c*) of the article enjoins the State to direct its policy towards securing—"that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment". Article 31-C has been introduced by the 25th Amendment in order to achieve the purpose set out in Article 39(*b*) and (*c*).

2120. I have stated in the earlier part of my judgment that the Constitution accords a place of pride to Fundamental Rights and a place of permanence to the Directive Principles. I stand by what I have said. The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a sovereign Democratic Republic and to secure to "all its citizens", Justice—social, economic and political—liberty and equality. Fundamental Rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livilihood; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure; and raising the level of health and nutrition are not matters for compliance with the Writ of a Court. As I look at the provisions of Parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. Therefore, Article 37 enjoins the State to apply the Directive Principles in making laws. The freedoms of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granville Austin;[82]

---

[81] *Some Characteristics of the Indian Constitution*, 1953, 30-32.

[82] *The Indian Constitution—Cornerstone of a Nation*, Edn. 1966.

together constitute "the conscience of the Constitution" The Nation stands to-day at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

2121. Turning first to the new Article 31(2), the substitution of the neutral expression "amount" for "compensation" still binds the Legislature to give to the owner a sum of money in cash or otherwise. The Legislature may either lay down principles for the determination of the amount or may itself fix the amount. There is, however, intrinsic evidence in Article 31(2) that it does not empower the State to confiscate or expropriate property. Not only does Article 31(2) not authorise the legislature to fix "such amount as it deems fit", "in accordance with such principles as it considers relevant", but it enjoins the legislature by express words either to fix an 'amount' for being paid to the owner or to lay down "principles" for determining the amount to be paid to him. If it was desired to authorise the Legislature to pass expropriatory laws under Article 31(2), nothing would have been easier for the Constituent Body than to provide that the State shall have the right to acquire property for a public purpose without payment of any kind or description. The obligation to pay an "amount" does not connote the power not to pay any amount at all. The alternative obligation to evolve principles for determining the amount also shows that there is no choice not to pay. The choice open to the legislature is that the amount may directly be fixed by and under the law itself or alternatively, the law may fix principles in accordance with which the amount will be determined. The amount may, of course, be paid in cash or otherwise.

2122. The specific obligation to pay an "amount" and in the alternative the use of the word "principles" for determination of that amount must mean that the amount fixed or determined to be paid cannot be illusory. If the right to property still finds a place in the Constitution, you cannot mock at the man and ridicule his right. You cannot tell him: "I will take your fortune for a farthing".

2123. But this is subject to an important, a very important, qualification. The amount fixed for being paid to the owner is wholly beyond the pale of a challenge that it is inadequate. The concept of adequacy is directly co-related to the market value of the property and therefore such value cannot constitute an element of that challenge. By the same test and for similar reasons, the principles evolved for determining the amount cannot be questioned on the ground that by application of those principles the amount determined to be paid is inadequate, in the sense that it bears no reasonable relationship with the market value of the property. Thus the question whether the amount or the principles are within the permissible constitutional limits must be determined without regard to the consideration whether they bear a reasonable relationship with the market value of the property. They may not bear a reasonable relationship and yet they may be valid. But to say that an amount does not bear reasonable relationship with the market value is a different thing from saying that it bears no such relationship at all, none whatsoever. In the latter case the payment becomes illusory and may come within the ambit of permissible challenge.

2124. It is unnecessary to pursue this matter further because we are really concerned with the constitutionality of the Amendment and not with the validity of a law passed under Article 31(2). If and when such a law comes before this Court it may become necessary to consider the matter closeiy. As at present advised, I am inclined to the view which as I have said is unnecessary to discuss fully, that though it is not open to the court to question a law under Article 31(2) on the ground that the amount fixed or determined is not adequate, courts would have the power to question such a law if the amount fixed thereunder is illusory; if the principles, if any are stated, for determining the amount are wholly irrelevant for fixation of the amount; if the power of compulsory acquisition or requisition is exercised for a collateral purpose; if the law offends constitutional safeguards other than the one contained in Article 19(1)(*f*); or if the law is in the nature of a fraud on the Constitution. I would only like to add, by way of explanation, that if the fixation of an amount is shown to depend upon principles bearing on social good it may not be possible to say that the principles are irrelevant.

2125. As regards the new Article 31(2-B) I see no substance in the submission of the petitioner that the exclusion of challenge under Article 19(1)(*f*) to a law passed under Article 31(2) is bad as being in violation of the principles of natural justice. I have stated earlier that constitutional amendments partake of the vitality of the Constitution itself, provided they are within the limits imposed by the Constitution. The exclusion of a challenge under Article 19(1)(*f*) in regard to a law passed under Article 31(2) cannot therefore be deemed unconstitutional. Besides, there is no reason to suppose that the legislature will act so arbitrarily as to authorise the acquisition or requisitioning of property without so much as complying with the rules of natural justice. Social good does not require that a man be condemned unheard.

2126. Article 31-C presents a gordian knot. King Gordius of Phrygia had tied a knot which an oracle said would be undone only by the future master of Asia. Alexander the Great, failing to untie the knot, cut it with his sword. Such a quick and summary solutions of knotty problems is, alas, not open to a Judge. The article read thus:

> "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (*b*) or clause (*c*) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

2127. A misconception regarding the ambit of this article may first be removed. The article protects only 'law" and not an executive action. The term 'law' is used in Article 13(3) in a wider sense, so as to include an ordinance, order, bye-law, etc., but that definition is limited to the purposes of Article 13. Article 31-C cannot therefore be said to violate the provisions of Article 31(1) under which no person can be deprived of his property save by authority of law. It is, however, not to be denied that the word 'law' in Article 31-C may include all incidents and aspects of law-making.

2128. In order properly to understand the scope of Article 31-C, it would be necessary to refer to the history of the allied provisions of the Constitution. Prior to the 4th Constitutional Amendment which came into force on April 27, 1955, Articles 31-A and 31-B which were introduced by the First Amendment Act, 1951 excluded wholly the provisions of Part III in regard to laws providing for the acquisition of any estate or of any rights therein. The reason of the rule was that the rights of society are paramount and must be placed above those of the individual.

2129. The language of Article 31-C makes it clear that only such laws will receive its protection as are for giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*). Under clause (*b*) the State has to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Under clause (*c*) the State has to take steps towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Apart from the declaration contained in the latter part of Article 31-B (*sic* 31-C), it seems to me transparent that the nexus between a law passed under Article 31-C and the objective set out in Article 39(*b*) and (*c*) is a condition precedent to the applicability of Article 31-C. The declaration cannot be utilised as a clock to protect laws bearing no relationship with the objective mentioned in the two clauses of Article 39.

2130. The objectives set out in Part IV of the Constitution were not limited in their application to agrarian reform. The 4th and 7th Amendments extended the basic principle underlying the First Amendment by introducing changes in Articles 31 and 31-A and the Twenty-fifth Amendment has taken one step further by extending the principle to a vaster field. Article 31-C will operate substantially in the same way as Article 31-A has operated in the agrarian sphere. In fact Article 31-C is a logical extension of the principles underlying Article 31(4) and (6) and Article 31-A.

2131. I find it difficult to accept the argument, so strongly pressed upon us, that Article 31-C delegates the amending power to State Legislatures and empowers them to make amendments to the Constitution without complying with the form and manner prescribed by Article 368. I am also unable to appreciate that the article empowers the Parliament likewise. The true nature and character of Article 31-C is that it identifies a class of legislation and exempts it from the operation of Articles 14, 19 and 31. Article 31(4) and (6) identified laws in reference to the period of their enactment. Articles 31(2) and 31-A identified the legislative field with reference to the subject-matter of the law. Articles 15(4) and 33 identified laws with reference to the objective of the legislation. In this process no delegation of amending power is involved. Thus, these various provisions, like Article 31-C, create a field exempt from the operations of some of the Fundamental Rights. The field of legislation is not created by Article 31-C. The power to legislate exists apart from and independently of it. What the article achieves is to create an immunity against the operation of the specified Fundamental Rights in a pre-existing field of legislation. In principle, I see no distinction between Article 31-C on the one hand and Articles 15(4), 31(4), 31(5) (*b*) (*ii*), and 31(6) on the other. I may also call attention to Article 31-A introduced by the First Amendment Act, 1951 under which "Notwithstanding anything contained in Article 13", no law providing for matters mentioned in clauses (*a*) to (*e*) "shall be deemed to be void on the ground that it is inconsistent or takes away or abridges any of the rights conferred by Articles 14, 19 or 31. The fact that the five clauses of Article 31-A referred to subject-matter of the legislation whereas Article 31-C refers to laws in relation to their object does not, in my opinion, make any difference in principle.

2132. The argument that Article 31-C permits a blatant violation of the form and manner prescribed by Article 368 overlooks that the article took birth after a full and complete compliance with the form and manner spoken of in Article 368. Besides, implicit in the right to amend Article 368 is the power, by complying with the form and manner of Article 368, to authorise any other body to make the desired amendments to constitutional provisions. The leading majority judgment in *Golak Nath's case* (supra) and Hidayatullah, J., thought of a somewhat similar expedient in suggesting that a Constituent Assembly could be convoked for abridging the Fundamental Rights. I do not see any distinction in principle between creating an authority like the Constituent Assembly with powers to amend the Constitution and authorising some other named authority or authorities to exercise the same power. This aspect of the matter does not, however, arise for further consideration, because Article 31-C does not delegate the power to amend.

2133. The latter part of Article 31-C presents to me no difficulty: "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy". Clearly this does not exclude the jurisdiction of the court to determine whether the law is for giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*). Laws passed under Article 31-C can, in my opinion, be upheld only, and only if, there is a direct and reasonable nexus between the law and the Directive Policy of the State expressed in Article 39(*b*) or (*c*). The law cannot be called in question on the ground that it does not give effect to such policy but I suppose no court can ever take upon itself the task of finding out whether a law in fact gives effect to its true policy. If such a latitude were open to the Judges, laws of Prohibition and Gambling should have lost their place on the statute book long since.

2134. In my opinion, therefore, Section 3 of the Twenty-fifth Amendment, which introduces Article 31-C, is valid.

The Constitution (Twenty-ninth amendment) Act, 1972

2135. In regard to the inclusion of the two Kerala Acts, (Act 33 of 1969 and Act 25 of 1971) in the Ninth Schedule by the Twenty-Ninth Amendment, it is urged by the petitioner's counsel that if the provisions of the two Acts do not fall within the terms of Article 31-A(1) (*a*), the Acts will not get the protection of Article 31-B.

2136. The validity of Article 31-B has been accepted in a series of decisions of this Court and I suppose it is too late in the day to re-open that question, nor indeed did the learned counsel for the petitioner challenge the validity of that article. In *State of Bihar* v. *Kameshwar Singh*,[83] a similar contention was considered and rejected by Patanjali Sastri, C. J., who spoke for the Court. The same view was reiterated in *Visweshwar Rao* v. *The State of Madhya Pradesh*,[84] by Mahajan, J. The argument fell to be considered once again in *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant, Thana*,[85] but Subba Rao, J., confirmed the view taken in the earlier cases. These cases have consistently held that the opening words of Article 31-B: "without prejudice to the generality of the provisions contained in Article 31-A" only indicate that the Acts and Regulations specified in the Ninth Schedule would obtain immunity even if they did not attract Article 31-A. If every Act in the Ninth Schedule has to be covered by Article 31-A, Article 31-B would become redundant. Article 31-B was, therefore, held not to be governed by Article 31-A. The Twenty-Ninth Amendment must, accordingly, be held to be valid.

---

[83] 1952 SCR 889: AIR 1952 SC 252: 1952 SCJ 454.

2137. Debates of the Constituent Assembly and of the First Provisional Parliament were extensively read out to us during the course of arguments. I read the speeches with interest, but in my opinion, the debates are not admissible as aids to construction of constitutional provisions. In *Gopalan's case*,[86] Kania, C. J., following the decisions in *The Municipal Council of Sydney* v. *The Commonwealth*[87] and *United States* v. *Wong Kim Ark*[88] observed that while it is not proper to take into consideration the individual opinions of Members of Parliament to construe the meaning of a particular clause, a reference to the debates may be permitted when a question is raised whether a certain phrase or expression was up for consideration at all or not. According to Mukherjea, J., (page 274), the debates of the Constituent Assembly are of doubtful value as an aid to discover the meaning of the words in a Constitution. The learned Judge said that a resort can be had to the debates with great caution and only when latent ambiguities are to be resolved. A similar view was expressed by this Court in *State of Travancore-Cochin and Another* v. *Bombay Company Limited*.[89] In the *Golak Nath case* (supra), Subba Rao, C J., clarified that he had not referred to the speeches made in the Constituent Assembly for the purpose of interpreting the provisions of Article 368. Bachawat, J., also took the same view.

2138. It was urged by the learned Advocate-General of Maharashtra that there is a noticeable change in the attitude of this Court to parliamentary debates since the decision in *Gopalan's case* (supra) and that the most pronounced trend manifested itself first in *Golak Nath's case* (supra) and then decisively in the *Privy Purse case*.[90] The practice followed in the *Privy Purse case* (supra) is said to have been adopted both by the majority and the minority in *Union of India* v. *H. S. Dillon*.[91]

2139. I am unable to agree that any reliance was placed in the *Privy Purse case* (supra) or in *Dillon's case* (supra) on parliamentary speeches, for the purpose of interpreting the legal provisions. Shah, J., in the *Privy Purse case* (supra), referred to the speech of Sardar Vallabhbhai Patel in order to show the circumstances in which certain guarantees were given to the former Rulers. The Advocate-General is right that Mitter, J., made use of a speech for construing Article 363, but that was done without discussing the question as regards the admissibility of the speech. In *Dillon's case* (supra), it is clear from the judgment of the learned Chief Justice, that no use was made of the speeches in the Constituent Assembly for construing any legal provision. In fact, the learned Chief Justice observed that he was glad to find from the debates that the interpretation which he and two of his colleagues had put on the legal provision accorded with what was intended.

---

[84] 1952 SCR 1020: AIR 1952 SC 252, 296: 1952 SCJ 427.

[85] (1965)1 SCR 636: AIR 1965 SC 1096.

[86] 1950 SCR 88, 110: AIR 1950 SC 227: 1950 SCJ 174: 51 Cri LJ 1383.

[87] (1904)1 Com LR 208.

[88] (169) US 649, 699.

[89] 1952 SCR 1112: AIR 1952 SC 366 1952 SCJ 527: (1952)3 STC 434.

[90] (1971)3 SCR 9, 83: (1971)1 SCC 85.

[91] (1971)2 SCC 779, 784, 829-30.

2140. It is hazardous to rely upon parliamentary debates as aids to statutory construction. Different speakers have different motives and the system of 'Party Whip' leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from the language it uses. Therefore, parliamentary proceedings can be used only for a limited purpose as explained in *Gopalan's case* (supra).

2141. Before summarising my conclusion, let me say that it is with the greatest deference and not without hesitation that I have decided to differ from the eminent Judges who constituted the majority in the *Golak Nath case* (supra). Two of them still adorn this Bench and to them as to the other learned Brothers of this Bench with whom it has not been possible to agree, I say that it has been no pleasure to differ from them, after being with some of them for a part of the time, on a part of the case. Their concern for common weal, I guess, is no less than mine and so let me express the hope that this long debate and these long opinions will serve to secure at least one blessing—the welfare of the common man. We are all conscious that this vast country has vast problems and it is not easy to realise the dream of the Father of the Nation to wipe every tear from every eye. But, if despite the large powers now conceded to the Parliament, the social objectives are going to be a dustbin of sentiments, then woe betide those in whom the country has placed such massive faith.

2142. My conclusions are briefly these:

(1) The decision of the leading majority in the *Golak Nath case* (supra) that the then Article 368 of the Constitution merely prescribed the procedure for amendment of the Constitution and that the power of amendment had to be traced to Entry 97 of List I, Schedule VII read with Articles 245, 246 and 248 is not correct.

(2) The decision of the leading majority and of Hidayatullah, J., that there is no distinction between an ordinary law and a law amending the Constitution is incorrect. Article 13(2) took in only ordinary laws, not amendments to the Constitution effected under Article 368.

(3) The decision of the leading majority and of Hidayatullah, J., that Parliament had no power to amend the Constitution so as to abrogate or take away Fundamental Rights is incorrect.

(4) The power of amendment of the Constitution conferred by the then Article 368 was wide and unfettered. It reached every part and provision of the Constitution.

(5) Preamble is a part of the Constitution and is not outside the reach of the amending power under Article 368.

(6) There are no inherent limitations on the amending power in the sense that the Amending Body lacks the power to make amendments so as to damage or destroy the essential features or the fundamental principles of the Constitution.

(7) The 24th Amendment only declares the true legal position as it obtained before that Amendment and is valid.

(8) Section 2(*a*) and Section 2(*b*) of the 25th Amendment are valid. Though courts have no power to question a law described in Article 31(2) substituted by Section 2(*a*) of the Amendment Act, on the ground that the amount fixed or determined for compulsory acquisition or requisition is not adequate or that the whole or any part of such amount is to be given otherwise than in cash, courts have the power to question such a law if (*i*) the amount fixed is illusory; or (*ii*) if the principles, if any, are stated, for determining the amount are wholly irrelevant for fixing of the amount; or (*iii*) if the power of compulsory acquisition or requisition is exercised for a collateral purpose; or (*iv*) if the law of compulsory acquisition or requisition offends the principles of Constitution other than the one which is expressly excepted under Article 31(2-B) introduced by Section 2(*b*) of the 25th Amendment Act—namely Article 19(1)(*f*); or (*v*) if the law is in the nature of a fraud on the Constitution.

(9) Section 3 of the 25th Amendment which introduced Article 31-C into the Constitution is valid. Inspite, however, of the purported conclusiveness of the declaration therein mentioned, the Court has the power and the jurisdiction to ascertain whether the law is for giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*). If there is no direct and reasonable nexus between such a law and the provisions of Article 39(*b*) or (*c*), the law will not, as stated in Article 31-C, receive immunity from a challenge under Articles 14, 19 or 31.

(10) The 29th Amendment Act is valid. The two Kerala Acts mentioned therein, having been included in the Ninth Schedule, are entitled to the protection of Article 31-B of the Constitution.

2143. I would direct each party to bear its own costs.

2144. As I am coming to the close of my judgment, drafts of judgments of several of my esteemed colleagues are trickling in. As I look at them, I hear a faint whisper of Lord Dunedin. And then I thought: I began this judgment by saying that I wanted to avoid writing a separate judgment of my own. Are first thoughts best?

The view by the majority in these writ petitions is as follows:

(1) *Golak Nath's case** is overruled;

(2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;

(3) The Constitution (Twenty-fourth Amendment) Act, 1971, is valid ;

(4) Section 2(*a*) and 2(*b*) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid;

(5) The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid;

(6) The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to this stage.

The Constitution Bench will determine the validity of the (Twenty-sixth Amendment) Act, 1971 in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to this stage.

Sd. S. M. SIKRI, C.J.
Sd. J. M. SHELAT, J.
Sd. K. S. HEGDE, J.
Sd. A. N. GROVER, J.
Sd. P. JAGANMOHAN REDDY, J.
Sd. D. G. PALEKAR, J.
Sd. H. R. KHANNA, J.
Sd. A. K. MUKHERJEA, J.
Dated April 24, 1973. Sd. Y. V. CHANDRACHUD, J.

ORDER

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

---

* (1967) 2 SCR 762 : AIR 1967 SC 1643

SCC Online Academic Edition